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Supreme Court, U.S.
FILED
98 1829 MAY 12 1999
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No. _____

In The

Supreme Court of the United States

ORTHO BIOTECH, INC.,

Petitioner,

v.

OLIVER MEDLOCK, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a jury's award of front pay in a Title VII case "future pecuniary losses" that are compensatory damages subject to the cap set forth in 42 U.S.C. § 1981a?

What is "direct evidence" sufficient to merit application of a mixed-motive proof scheme under *Price Waterhouse v. Hopkins*?

Should the after-acquired evidence rule set forth in *McKennon v. Nashville Banner Publ'g Co.* be extended to misconduct of the plaintiff that occurs *after* he/she has been discharged and regardless of whether that misconduct occurred as a result of the termination?

LIST OF PARTIES

The following parties, whose names do not appear in the current caption of the case, were defendants in the district court: Johnson & Johnson Companies, Ortho Pharmaceutical Corporation, William C. Pearson III, W. Thomas Amick, Richard W. Zahn, C. Daniel Smith, Craig Mangean and James A. Moreland.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Ortho-McNeil Pharmaceutical, Inc. is the parent company of Petitioner Ortho Biotech, Inc. and owns 100% of the stock in Ortho Biotech, Inc. Ortho-McNeil Pharmaceutical, Inc. is a wholly-owned subsidiary of Johnson & Johnson. Johnson & Johnson is a publicly-held corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ortho Biotech, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 164 F.3d 545 and is reproduced in the Appendix, *infra*, A-1 – A-22. The opinion of the district court is unreported and is reproduced in the Appendix, *infra*, A-23 – A-30.

JURISDICTION

The Court of Appeals entered its judgment on January 5, 1999. Rehearing and rehearing *en banc* were denied on February 11, 1999. A-31 – A-32. The Court of Appeals Mandate issued on February 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of 42 U.S.C. § 1981a are set forth below:

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of

its disparate impact) prohibited under section 703, 704 or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

(b) Compensatory and punitive damages

* * *

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, shall not exceed, for each complaining party –

* * *

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000[.]

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, are as follows:

42 U.S.C. § 2000e-5. Enforcement provisions.

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice

charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful practice), or any other equitable relief as the court deems appropriate.

(2)(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-2(m) provides:

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

While employed by Petitioner Ortho Biotech, Inc. ("OBI"), Respondent Oliver Medlock ("Medlock") filed a lawsuit against OBI alleging race discrimination in violation of Title VII and various other causes of action. The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and under 28 U.S.C. § 1331 (general federal question jurisdiction). In addition, jurisdiction over Medlock's common law claims was invoked pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction) and 28 U.S.C. § 1332 (diversity jurisdiction).

During discovery in the lawsuit, OBI learned for the first time information that raised grave concerns about Medlock's behavior and mental state. In his disclosures and in his deposition, Medlock revealed that he had tape-recorded numerous private telephone conversations with co-workers, supervisors, and management without advising them that he was doing so. In his deposition, Medlock admitted that he had thought about and dreamed of killing his supervisor. He also admitted in his deposition that he had made derogatory and inappropriate statements about OBI to customers of OBI and that he had disclosed confidential information to OBI's primary competitor. In addition, during his deposition, he made angry, vulgar statements directed at OBI employees and agents, and he became so angry that the deposition had to be moved to the federal courthouse.

Medlock's supervisors had on several previous occasions warned and counseled him, both formally and informally, about his profane telephone calls, angry remarks and physical threats directed towards OBI's management and employees.

After OBI learned of Medlock's secret tape-recording of conversations and learned of Medlock's deposition testimony containing his startling admissions of wrongdoing and use of abusive and profane language, OBI suspended Medlock with pay and benefits on July 7, 1995. Shortly thereafter, a psychiatrist conducted a Rule 35 psychiatric evaluation of Medlock, and she advised OBI that Medlock was a danger to OBI's employees and agents. Following a thorough review of the information provided by Medlock in the course of discovery and the psychiatrist's conclusion about the risk of violence Medlock posed, OBI terminated Medlock's employment.

After his termination, Medlock amended his complaint to add a Title VII claim for retaliatory discharge. He also filed a claim for unemployment compensation benefits. During the hearing on his claim for unemployment benefits, Medlock made angry and vulgar statements and cursed and improperly touched OBI's counsel. Among other things, Medlock yelled at OBI's counsel: "There, I have touched you. You are the biggest fucking asshole."

At trial, OBI's Human Resources Director, Marilyn Thompson, testified about Medlock's suspension. She testified that as a result of management's concern about the information revealed by Medlock in his deposition – that he had contemplated killing his supervisor and had inappropriately communicated with customers – OBI suspended Medlock with pay and benefits. Ms. Thompson sent a letter to Medlock on July 7, 1995 informing him that he was being suspended "[a]s a result of issues raised in your deposition." A-55.

In addition, OBI's President, Carol Webb, testified at trial about the prior warnings and counseling that Medlock had received from his superiors about his behavior, including his belligerent and profane telephone calls, angry demands and physical threats.

Ms. Webb also testified about her decision to terminate Medlock's employment approximately one month after he was suspended. She testified that the decision to discharge Medlock was based on Medlock's misconduct and that his behavior and activities were unacceptable violations of the rules contained in OBI's Personnel Practices Manual. She sent a letter to Medlock on August 11, 1995, listing the numerous reasons why OBI was terminating his employment, including his secret tape recording of conversations with co-workers and management, his admissions that he had communicated with customers and competitors in violation of OBI policies, the anger and contempt he expressed in his deposition towards OBI management, and the fact that he had been warned and counseled in the past about his belligerent, profane and angry behavior. A-56 – A-60.

Medlock admitted at trial that he had engaged in much of the misconduct cited in Ms. Webb's letter. Moreover, he did not dispute that while still employed by OBI, he had thought about killing his supervisor. He also admitted to touching and cursing at OBI's counsel during the unemployment compensation hearing. Indeed, a tape recording of the cursing was played at the trial.

At the jury instruction conference, OBI requested that the jury receive a Title VII retaliatory discharge instruction using the pretext proof scheme set forth in *McDonnell Douglas*. The district court rejected OBI's proposed pretext instruction (*see* A-35 – A-37), and instead gave the

jury a *Price Waterhouse* mixed-motive instruction. A-46 – A-48.

OBI also requested an instruction that its damages could be limited based on "after-occurring evidence," *i.e.*, based on Medlock's inappropriate touching and cursing at OBI's counsel during the unemployment compensation hearing. *See* A-38. The district court declined to give such an instruction.

The jury found in favor of OBI on all claims except one. The jury found that OBI had terminated Medlock in retaliation for filing and pursuing his race discrimination charge, in violation of Title VII. The jury awarded Medlock the following damages: (1) $100,000 for loss of compensation to the date of the trial; (2) $200,000 for "future loss of compensation";[1] (3) $75,000 for mental anguish, humiliation, etc.; and (4) $100,000 in punitive damages. A-49 – A-53; *see also* A-33 – A-34. The district court discounted the jury's award for future lost compensation to a present value of $185,153.62. A-34. OBI requested that the district court reduce the amount of the judgment because the jury's award for future loss of compensation, when added to the jury's awards for mental anguish and punitive damages, exceeded the $200,000 cap on compensatory and punitive damages set forth in 42 U.S.C. § 1981a for an employer of OBI's size. The district court denied OBI's request.

OBI filed a Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial, which the district court denied. A-23 – A-30. The Tenth Circuit affirmed the judgment of the district court. A-1 – A-22. Although Medlock opposed OBI's Motion for Judgment as a Matter

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[1] Plaintiff sought only front pay and not reinstatement.

of Law, Medlock's counsel has informed OBI that Medlock desires that a new trial be held.

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted Because the Tenth Circuit's Ruling That Damages Awarded, in This Case by a Jury, for "Loss of Future Compensation" Are Not Subject to the Statutory Cap on Compensatory and Punitive Damages Reflects an Important Issue of Federal Statutory Construction That Has Split the Circuit Courts of Appeals.

A. The Circuit Court Decisions Are Split.

The Tenth Circuit in the instant case and the Eighth Circuit in *Kramer v. Logan County School Dist. No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998), have held that front pay is excluded from the cap on compensatory and punitive damages set forth in 42 U.S.C. § 1981a. The Sixth Circuit adopted the opposite view in *Hudson v. Reno*, 130 F.3d 1193, 1204 (6th Cir. 1997), *cert. denied*, 119 S.Ct. 64 (1998). In virtually every employment discrimination case in which the plaintiff does not seek reinstatement, an award of front pay is sought.[2] The lower courts need guidance as to whether front pay awards are deemed damages for "future pecuniary losses" and therefore subject to the cap. Furthermore, it is important for this Court to resolve the conflict that is emerging in the circuit courts regarding the definition of "future pecuniary losses" as set forth in the Civil Rights Act of 1991.

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[2] Petitioner's Westlaw search of cases decided from 1992 to the present in which front pay was awarded or otherwise addressed by a federal district court or court of appeals under Title VII or the Americans with Disabilities Act revealed fifty-seven published decisions.

B. The Plain Language of the Statute Dictates That Front Pay Awards Should Be Deemed Compensation for "Future Pecuniary Losses."

The difference of opinion between the circuit courts turns on whether front pay represents damages for "future pecuniary losses" under Section 102(b)(3) of the Civil Rights Act of 1991 or whether it is a form of "other equitable relief" authorized under Section 706(g) of the Civil Rights Act of 1964.

Section 102(b)(3) of the Civil Rights Act of 1991 sets forth the limitations on compensatory damages, as follows:

> (3) Limitations.
> The sum of the amount of compensatory damages awarded under this section for *future pecuniary losses*, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –
>
> * * *
>
> (C) In the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000[.]

42 U.S.C. § 1981a(b)(3) (emphasis added).

Subsection (b)(2) of the same statute states:

> Compensatory damages under this section shall not include back pay, interest on back pay, or any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)] *or any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964.*

42 U.S.C. § 1981a(b)(2) (emphasis added).

According to the Sixth Circuit in *Hudson*, an award of front pay is "future pecuniary losses" that "is not authorized by the plain language of § 706(g) itself." *Hudson*, 130 F.3d at 1204. In contrast, the Tenth and Eighth Circuits have held that front pay is "other equitable relief" that has been previously awarded by courts and therefore authorized under Section 706(g). *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 556 (10th Cir. 1999); *Kramer*, 157 F.3d at 626.

The Tenth and Eighth Circuits' decisions on the front pay issue are erroneous because they fail to take into account the plain language of the 1991 Civil Rights Act amendments. As this Court is well aware, the language of the statute itself is the starting point in interpreting any statute. *See United States v. James*, 478 U.S. 597, 604 (1986). Absent a clearly expressed legislative intention to the contrary, that language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). A court's responsibility is to give the words used in any statute their "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, if the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

The Sixth Circuit followed these canons of statutory construction when it correctly ruled that front pay should be deemed damages for "future pecuniary losses" within the meaning of the statute. As the Sixth Circuit noted, the words "future pecuniary losses" are commonly defined as follows:

1. Future: existing or occurring at a later time;
2. Pecuniary: consisting of or measured in money;
3. Losses: an amount that is lost.

Hudson, 130 F.3d at 1203 (citing Webster's Ninth New Collegiate Dictionary 500, 806, 700).

In other words, the term "future pecuniary losses," when given its common, ordinary meaning, means "an amount of money which will be lost at a later time." *Id.* The term "future pecuniary losses" encompasses "front pay" inasmuch as "front pay" is "widely defined as the salary that an employee would have received had he or she not been subjected to unlawful discrimination of his employer. . . . " *Id.* (citations omitted). *See also Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995).

C. Front Pay Is Not Universally Regarded as Equitable Relief.

Admittedly, courts have awarded front pay as an alternative to reinstatement under Section 706(g) of Title VII; however, such front pay awards are not specifically "authorized" by Section 706(g). Moreover, front pay, when awarded, has not been universally regarded as "equitable" relief under Section 706(g). As *Hudson* recognized, the Sixth Circuit historically has treated front pay, "in most contexts, as a *legal*, rather than an equitable, remedy." 130 F.3d at 1203-04 (emphasis added). The Seventh Circuit has taken a similar position, noting that because front pay is awarded to compensate for lost future earnings, it is a *legal*, rather than an equitable remedy not provided for under Section 706(g). *See McKnight v. General Motors Corp.*, 908 F.2d 104, 116-17 (7th

Cir. 1990) (emphasis added), *cert. denied*, 449 U.S. 919 (1991). *See also Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1039 (7th Cir. 1994) (prior to the Civil Rights Act of 1991 and its allowance for compensatory damages, the availability of front pay under Title VII was "an open question" in the Seventh Circuit).

D. Congress and This Court Have Recognized That Monetary Relief Under Section 706(g) Is Limited to Back Pay.

Even this Court observed that prior to the 1991 Act, Section 706(g) generally limited a plaintiff's monetary relief to back pay. In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court stated:

> Before the enactment of the 1991 Act, Title VII afforded only "equitable" remedies. *The primary form of monetary relief available was back pay.*
>
> * * *
>
> Section 102 [of the Civil Rights Act of 1991] significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to back pay under prior law. *Before 1991, for example, monetary relief for a discriminatorily discharged employee generally included "only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement,* along with lost fringe benefits such as vacation pay and pension benefits."

Landgraf, 511 U.S. at 252-53 (footnotes and citations omitted) (emphasis added).

Congress also recognized that Section 706(g), prior to the 1991 Act, generally limited a plaintiff's monetary relief to back pay. The House Report noted that back pay, "as the *exclusive* monetary remedy under Title VII," had not served as an effective deterrent. *See* H. Rep. No.

102-40(I) at 69, 102d Cong., 1st Sess. 69 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 607 (emphasis added). It also noted that "Title VII's *exclusive remedy* of back pay" served as a powerful disincentive for victims to vindicate their rights. *Id.*, 1991 U.S.C.C.A.N. at 608 (emphasis added).

In light of the above, OBI submits that both Congress and this Court were of the opinion, before the enactment of the 1991 Act, that front pay was not expressly authorized under Section 706(g). Given that knowledge, Congress could not have intended for front pay to be anything other than "future pecuniary losses" that are subject to the statutory cap.

E. Interpreting Section 102(b)(2) of the 1991 Civil Rights Act to Include Front Pay Within the Scope of "Future Pecuniary Losses" Would Render the Statutory Term Meaningless.

To interpret Section 102(b)(2) in any other way would render the term "future pecuniary losses" meaningless. As the Sixth Circuit noted in *Hudson*, if the phrase "future pecuniary losses" is not construed to include front pay, the phrase would be rendered meaningless inasmuch as the statute separately "defines" compensatory damages subject to the cap as compensatory damages for "future pecuniary losses" and "non-pecuniary losses." *Hudson*, 130 F.3d at 1204. If the term "future pecuniary losses" does not refer to front pay, it is hard to see what it would refer to at all. Indeed, no other types of "future pecuniary losses" even exist in employment discrimination cases.

F. Front Pay Is Not a Substitute for Equitable Relief When the Plaintiff Does Not Seek Reinstatement and When the Jury Awards the Front Pay.

Characterizing the award of front pay in this case as "equitable relief" would fly in the face of the facts. Medlock sought only front pay and not reinstatement. Thus, the front pay award cannot be characterized as an alternative to or substitute for the clearly equitable remedy of reinstatement. Moreover, the *jury*, rather than the *court*, awarded Medlock the front pay. Only courts have the authority to award equitable relief. Thus, the jury's award of front pay to Medlock can only be characterized as legal relief.

In light of the above, OBI respectfully requests that the Court grant certiorari to determine whether a jury's award of damages for "loss of future compensation" or front pay should be deemed "future pecuniary losses" that are subject to the statutory cap.

II. The Petition Should Be Granted Because There Is Considerable Confusion and a Split Among the Circuit Courts of Appeal Regarding When a Plaintiff Has Presented Sufficient "Direct Evidence" to Take Advantage of the *Price Waterhouse* Mixed-Motive Proof Scheme.

A. The *Price Waterhouse* "Direct Evidence" Standard Is Unclear.

The circuit courts of appeal have interpreted Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as requiring a plaintiff to produce "direct evidence" of discrimination before a mixed-motive analysis applies. The direct evidence

requirement has produced considerable confusion among the circuit courts of appeals, and at least two different standards exist for determining when a plaintiff has presented "direct evidence" sufficient to satisfy that standard. OBI is asking the Court to clarify the ambiguity in the *Price Waterhouse* "direct evidence" standard and to resolve the split in the circuit courts on this important issue.

1. The Tenth Circuit's ruling.

The Tenth Circuit held that a mixed-motive analysis (in this case, a mixed-motive jury instruction) is appropriate in any case where there is evidence sufficient to permit the trier of fact to find both forbidden and permissible motives for the adverse employment decision. A-13. According to the Tenth Circuit, that evidence may be either "direct or circumstantial evidence that the alleged retaliatory motive actually relate[s] to the question of discrimination in the particular employment decision." A-6. In other words, the evidence must "directly reflect" the alleged retaliatory attitude. A-6.

Applying this erroneous standard, the Tenth Circuit allowed Medlock's Title VII retaliatory discharge claim to proceed to the jury with a mixed-motive jury instruction even though Medlock had produced only *circumstantial* evidence of retaliatory motive. As discussed in more detail below, the Tenth Circuit's standard conflicts with the decisions of three other circuit courts of appeal which have held that *circumstantial* evidence of discriminatory

or retaliatory motive is insufficient to implicate *Price Waterhouse*.[3]

2. *Price Waterhouse* and the "direct evidence" rule.

A plaintiff may meet his/her burden to prove discriminatory or retaliatory animus in one of two ways. Where the plaintiff lacks direct evidence of the discrimination or retaliation, the plaintiff will rely on the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Where the plaintiff, however has

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[3] Section 107(a) of the Civil Rights Act of 1991, now codified at 42 U.S.C. § 2000e-2(m), overruled the Supreme Court's decision in *Price Waterhouse* to the extent *Price Waterhouse* holds that an employer may avoid a finding of liability by proving it would have taken the same action even absent the unlawful motive. Section 107(a) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was the motivating factor for any employment practice, even though other factors also motivated the practice." Section 107(b) of the Civil Rights Act of 1991, now codified at 42 U.S.C. § 2000e-5(g)(2)(B), goes on to state that when a plaintiff proves a violation under Section 107(a) but the defendant demonstrates that it would have taken the same action in the absence of the impermissible motivating factor, the court may only grant declaratory and injunctive relief, attorneys' fees and costs, and may not award damages or order reinstatement or other similar relief. Thus, while the Civil Rights Act of 1991 changes the relief that is available, it does not create the mixed-motive standard. Nor does it address what type of evidence is required to meet that standard. Consequently, *Price Waterhouse* continues to control when a mixed-motive instruction is appropriate. *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995).

direct evidence of discrimination, the *McDonnell Douglas* framework is inapplicable, *id.*, and the plaintiff may instead rely on *Price Waterhouse*. *Lacks v. Ferguson Reorganized School Dist.*, 147 F.3d 718, 724 (8th Cir. 1998), *cert. denied*, 119 S.Ct. 1158 (1999); *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995).

Under the *McDonnell Douglas* proof scheme, the plaintiff bears the initial burden of establishing a prima facie case of retaliation. If a defendant is able to articulate a legitimate non-retaliatory reason or reasons for the adverse action, the plaintiff must then show that the articulated reason(s) was a pretext for retaliation. *McDonnell Douglas*, 411 U.S. at 804. The *McDonnell Douglas* framework is unworkable, however, when the adverse employment action is the alleged product of a mixture of legitimate and illegitimate motives, because it "simply makes no sense" to ask whether the articulated reason for the adverse action was the "true reason" for the adverse employment action. *Price Waterhouse*, 490 U.S. at 247. The plurality in *Price Waterhouse* therefore concluded that the traditional pretext framework of *McDonnell Douglas* should not be applied in cases where the employer relied on both an impermissible and a legitimate reason when making an employment decision. *Id.* at 247.

Justice O'Connor concurred with the plurality opinion, but went one step further by concluding that the plaintiff must present "direct evidence" that the defendant relied on a discriminatory (or retaliatory) criterion. *Id.* at 277 (O'Connor, J., concurring). According to Justice O'Connor, "what is required is . . . *direct* evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.* (emphasis added).

3. The circuit courts differ in their interpretation of Justice O'Connor's "direct evidence" standard.

Justice O'Connor failed to define "direct evidence" in her concurrence, and the circuit courts have differed in their interpretation of that standard. As the Third Circuit recently noted, "[t]he precise meaning of Justice O'Connor's term 'direct evidence' has divided the Courts." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1113 (3d Cir. 1997) (*en banc*) (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discriminatory and Equal Opportunity*, 47 Stan. L. Rev. 1161, 1220-21 (1995) (describing the varying approaches of the circuits); Michael A. Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 Stan. L. Rev. 959, 970-79 (1994) (same)).[4] *See also Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997) ("confusion . . . has arisen regarding the meaning of the word 'direct' in Justice O'Connor's concurring opinion").

The circuit court decisions can be divided into two categories. The first category consists of those cases that

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[4] Other commentators have noted the same divergence in the circuit court opinions. *See* Joseph J. Ward, *Call for Price-Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 648-649 (1997) (observing the "turmoil within the courts" in attempting to interpret the direct evidence standard); Steven M. Tindall, *Do as She Does, Not as She Says, The Shortcomings of Justice O'Connor's Direct Evidence Requirement in Price-Waterhouse v. Hopkins*, 17 Berkley J. Employ. & Lab. L. 332, 353 (1996) (noting that Justice O'Connor's direct-evidence test has generated "confusion among lower courts").

apply the traditional definition of direct evidence to mean non-circumstantial evidence. The decisions of the First, Fifth and Sixth Circuits fall within this category.[5] *See Brady v. Fort Bend County*, 145 F.3d 691, 711 (5th Cir. 1998) (*McDonnell Douglas* proof scheme inapplicable where plaintiff presents direct rather than circumstantial evidence; direct evidence is evidence that proves the fact without inference), *cert. denied*, 119 S.Ct. 873 (1999); *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 420-21 (1st Cir. 1996) ("[a]bsent the evidentiary equivalent of a 'smoking gun,' the plaintiff must attempt to prove her case by resort to a burden-shifting framework" under *McDonnell Douglas* rather than *Price Waterhouse); Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994) (plaintiff's evidence, which was "at most, circumstantial evidence of discrimination" was not sufficient to meet the direct evidence standard of *Price Waterhouse*).

A second group of cases does not distinguish between direct and circumstantial evidence and allows a plaintiff to take advantage of *Price Waterhouse*'s burden-shifting approach under a rule similar to that set forth in this case. In those cases, the plaintiff may proceed under *Price Waterhouse* if he/she presents evidence of conduct or statements of decisionmakers relating to the decision-making process that reflect discriminatory or retaliatory animus. *See Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998) (conduct or

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[5] Commentators have included the Tenth Circuit's pre-*Medlock* decisions in this line of cases. *See, e.g.*, Ward, *A Call for Price Waterhouse II, supra*, 61 Alb. L. Rev. at 650; Zubrensky, *Despite the Smoke, supra*, 46 Stan. L. Rev. at 973 (1994).

statements by persons involved in decisionmaking process that may be viewed as directly reflecting the alleged discrimination sufficient to permit the factfinder to find that the discrimination was more likely than not a motivating factor in the employer's decision); *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 353-54 (D.C. Cir. 1997) (direct evidence does not disqualify circumstantial evidence, it means only that the evidence of discriminatory motive must "actually relate to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated forms of discrimination"); *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996) (plaintiff may demonstrate discriminatory animus through direct or circumstantial evidence such as ambiguous statements or suspicious timing.); *Fuller v. Phipps*, 67 F.3d 1137, 1141-42 (4th Cir. 1995) (requiring evidence of conduct or statements "that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision"); *Hook v. Ernst & Young*, 28 F.3d 366, 375 (3d Cir. 1994) (same); *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171 (2d Cir. 1992) (same).[6]

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[6] The Eleventh Circuit falls somewhere between these two categories. In *Burrell v. Board of Trustees of Georgia Military College*, 125 F.3d 1390 (11th Cir. 1997), the Eleventh Circuit defined direct evidence necessary to meet the *Price Waterhouse* standard as "evidence which if believed, proves existence of facts in issue without inference or presumption." *Id.* at 1393 (citations omitted). At the same time, it also held that a direct nexis must exist between the discriminatory statement and the adverse employment action. *Id.* at 1393-94, n. 7. Thus, it is not clear whether the Eleventh Circuit will focus on direct as opposed to circumstantial evidence or on the evidence being sufficiently tied to the decisionmaking process.

4. This issue is sufficiently meritorious for the Court to grant certiorari.

The Tenth Circuit's decision is clearly in conflict with other circuit courts, which differ in their interpretation and analysis of Justice O'Connor's "direct evidence" standard. Legal commentators and courts alike have recognized the confusion among the courts. For these reasons, Petitioner respectfully requests that the Court grant certiorari on this issue.

B. The Tenth Circuit's Decision Was Erroneous.

1. Policy reasons do not support the Tenth Circuit's decision.

Policy reasons dictate that the mixed-motive proof scheme should be used only in those cases where a plaintiff has direct, non-circumstantial evidence that the employer had discriminatory or retaliatory animus. Unlike the *McDonnell Douglas* pretext proof scheme where the burden of persuasion remains at all times with the plaintiff (*see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-11 (1993)), the mixed-motive proof scheme shifts the burden of persuasion to the defendant. The defendant then has the burden to convince the jury that it would have reached the same decision to terminate the plaintiff even in the absence of the discriminatory or retaliatory motive. *Price Waterhouse*, 490 U.S. 228, 237, 242 (1989) (plurality opinion).

Under *Price Waterhouse*, when the defendant met that burden, the defendant avoided any liability. *Id.* at 258 (plurality opinion); *id.* at 276 (O'Connor, J., concurring). The Civil Rights Act of 1991, however, modified the *Price Waterhouse* scheme, making mixed-motive treatment more

favorable to plaintiffs. Under Section 107 of the Act, an employer may no longer avoid liability by proving that it would have made the same decision for nondiscriminatory or nonretaliatory reasons. Instead, liability, albeit limited, now attaches whenever race, age or some other protected category "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

Because the mixed-motive analysis allows plaintiffs more favorable treatment and imposes a greater burden on employers, it logically follows that a plaintiff must be able to meet the higher evidentiary standard of direct, non-circumstantial evidence. As Justice O'Connor noted in her concurring opinion in *Price Waterhouse*, "the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation" should not be administered lightly. 490 U.S. at 262. Because true direct evidence is relatively rare, plaintiffs who are able to provide the necessary direct evidence deserve the opportunity to shift the burden of proof to the defendant.

Some commentators have argued that strictly defining direct evidence to exclude circumstantial evidence makes it too difficult for plaintiffs to take advantage of the mixed-motive framework. *See, e.g.*, Tindall, *supra*, at 346-47 (discussing the "near impossibility" that a plaintiff would be able to produce direct evidence as required by Justice O'Connor); Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 Alb. L. Rev. 1, 84 (1995) (stating that a strict direct evidence requirement is too difficult to meet and will cause plaintiffs to forfeit the benefit of the *Price Waterhouse* burden shifting instruction). Such concerns

are not justified, however. A plaintiff who provides evidence that falls short of satisfying the strict direct evidence requirement will still have the opportunity to prove his/her claims of discrimination or retaliation under the third stage of the traditional *McDonnell Douglas* framework.

Moreover, not all evidence that is probative of discrimination should entitle the plaintiff to the mixed-motive proof scheme. Otherwise, any plaintiff who is able to make a prima facie showing in a pretext case would qualify for a mixed-motive instruction, merging the two categories of cases and subverting this Court's efforts to distinguish the two theories. *Hook v. Ernst & Young*, 28 F.3d 366, 374-75 (3d Cir. 1994).

2. Medlock's evidence was circumstantial and therefore not "direct evidence."

In the case at bar, Medlock's evidence was completely circumstantial. In his post-trial brief, Medlock characterized his evidence as a "sequence of events from which a retaliatory motive reasonably could be inferred." According to Medlock, this alleged "sequence of events" consisted of OBI management knowing of the proffered reasons for Medlock's suspension and discharge, but waiting several months to take any action against him.

In addition to presenting this "sequence of events" from which a retaliatory motive purportedly could be inferred, Medlock presented statements by two decision-makers that – according to Medlock's post-trial brief "reasonably could be interpreted" as reflecting a retaliatory attitude. The first statement was contained in the suspension letter from OBI's Director of Human Resources to Medlock, which began: "As a result of issues raised in

your deposition, effective immediately, you are suspended from all duties on behalf of the Company." A-55. The second statement was contained in the letter from OBI's President to Medlock informing him of his discharge. A-56 – A-60. Medlock pointed to the following language: "During the entire term of your employment, you have communicated your deep dissatisfaction with your compensation to Ortho Biotech management and Ortho Biotech Human Resources personnel." A-56.

Neither of these letters constituted *direct* evidence of retaliation. Neither letter is retaliatory on its face, and each requires the jury to make inferences and assumptions based on the circumstances. In addition, nothing about the "sequence of events" constitutes direct evidence of retaliation. The sequence of events, at best, amounts to suspicious timing from which retaliation could possibly be inferred.

Given that Medlock presented only circumstantial evidence from which the jury could infer retaliation, the *McDonnell Douglas* evidentiary scheme should have been applied. The Tenth Circuit's ruling that Medlock was entitled to a mixed-motive jury instruction was therefore erroneous.

III. The Petition Should Be Granted Because Public Policy Reasons Support Extending the After-Acquired Evidence Rule to Post-Termination Conduct.

OBI also requests that the Court grant certiorari to determine whether the after-acquired evidence rule set forth in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) should be extended to apply to evidence regarding post-termination misconduct, even when that

misconduct may have resulted from the discriminatory or retaliatory termination. This presents two questions: (1) is an employer entitled to limit its damages in an employment discrimination case if the employer demonstrates that the plaintiff engaged in post-termination misconduct that was so severe that it would have been grounds for discharge; and (2) if so, should the employer be precluded from relying on this rule if the misconduct occurred as a result of the termination?

A. Medlock's Post-Termination Misconduct Was Sufficiently Serious to Warrant a Jury Instruction Allowing the Jury to Limit OBI's Liability for Back and Front Pay.

It was undisputed at trial that Medlock improperly touched and cursed at OBI's counsel at his unemployment compensation benefits hearing following his termination. It was also undisputed that OBI had previously warned and counseled Medlock about his profane telephone calls, angry remarks, and physical threats directed towards OBI's management and staff during the course of his employment. Moreover, Medlock admitted at trial that while he was employed by OBI he had thoughts of killing his supervisor.

The district court refused to instruct the jury that OBI's damages could be limited based on the post-termination evidence that Medlock had touched and cursed at OBI's counsel. The Tenth Circuit upheld the district court's refusal to give an after-occurring evidence instruction because the misconduct had occurred at the unemployment benefits hearing, which was occasioned by Medlock's discharge. A-19 – A-20. The court held that where the alleged misconduct arises as a direct result of

the unlawful termination, "the necessary balancing of the equities" does not support a *McKennon*-type instruction. A-19 – A-20.

B. Contrary to the Tenth Circuit's Ruling, Public Policy Reasons Support Extending *McKennon* to Post-Termination Conduct.

While the Tenth Circuit's ruling is the only circuit court decision on this issue, it nonetheless concerns an important issue. Whether *McKennon* should be extended to include employee misconduct arising after termination and whether that rule should be applied regardless of whether the misconduct arose as a result of the termination are two important questions of federal law that have not been, but should be, settled by this Court. Employers and employees alike have a valid interest in knowing whether an employee's misconduct following the alleged wrongful discharge will cut off the employer's liability to reinstate the employee or liability for front pay damages. Employees also have a significant interest in knowing whether their post-termination conduct will be subject to scrutiny.

Furthermore, extending *McKennon* to post-termination misconduct is consistent with the policies and rationale enunciated in *McKennon*. *McKennon* held that "as a general rule" neither reinstatement nor front pay is an appropriate remedy where, after termination of the employee, the employer discovers that the employee had engaged in wrongdoing which would have resulted in the employee's discharge. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361-62 (1995). The Court recognized that it "would both be inequitable and pointless to order the reinstatement of someone the employer would

have terminated, and will terminate, in any event and upon lawful grounds." *Id.* The Court also recognized the duality between the legitimate interests of the employer and the important claims of the employee who is invoking the national employment policy mandated by the discrimination laws. *Id.* at 361. The Court balanced these interests, and concluded that the employee's wrongdoing "must be taken into account . . . lest the employer's legitimate concerns be ignored." *Id.* In determining the appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee but rather to take account of the "lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing." *Id.*

Those very same policy reasons and balancing of the equities apply equally well to post-termination misconduct, and should apply regardless of whether that conduct flowed from the termination. In either case, it would be "inequitable and pointless" to order the reinstatement of an employee who the employer would have properly terminated. That rationale is even more applicable in this case where OBI had an obligation to discharge Medlock in order to prevent further violent behavior by Medlock toward OBI's employees and to insure a safe workplace.[7]

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[7] Had OBI failed to take action against Medlock, OBI would have been in violation of its duties under common law and the Occupational Safety and Health Act to provide its employees with a safe workplace. *See G.B. Goldman Paper Co. v. United Paper Workers Int'l Union*, 957 F.Supp. 607, 620 (E.D.Pa. 1997) ("[R]einstating a violent employee who is likely to harm other employees, co-workers, customers, or people would violate a 'well-defined and dominant' public policy concerning

C. The Tenth Circuit Improperly Distinguishes Between Post-Termination Misconduct Flowing from the Termination and Other Post-Termination Misconduct.

No valid basis supports the Tenth Circuit's distinction between post-termination misconduct that arises as a result of the retaliatory or discriminatory termination and other post-termination misconduct. This is particularly true here, where the post-termination conduct (a display of anger and profanity) was the *very same* type of conduct that OBI asserted it relied upon in terminating Medlock.

The Tenth Circuit attempted to support its distinction between misconduct arising as a result of the termination and other post-termination conduct by "envision[ing] a defendant goading a former employee into losing her temper, only to claim later that certain forms of relief should be unavailable because it would have discharged the plaintiff based on her inability to control her temper." A-20. While that is certainly a possibility, the likelihood of that occurring seems remote. What appears much more likely to occur, if the Tenth Circuit's rule is adopted, is a plaintiff taking advantage of the rule to ensure that he/she receives front pay in lieu of reinstatement. If a plaintiff knows that his/her former employer's liability cannot be cut off because of any post-termination misconduct on the plaintiff's part, the plaintiff is free to engage in misconduct that would render reinstatement unfeasible, if not impossible. The only option then would be an award of front pay.

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workplace safety."); 29 U.S.C. § 654(a)(1) (imposing on employers the general duty to provide employees with a workplace free from recognized hazards that are likely to cause death or serious physical harm).

This is precisely what happened in the case at bar. Medlock foreclosed any chance that the court would order reinstatement when he engaged in misconduct at the unemployment compensation hearing.

To adopt a rule that post-termination conduct is inconsequential merely because it flowed or resulted from the termination would amount to an endorsement of employee misconduct. Adoption of the Tenth Circuit's rule could also lead to disastrous results. What if Medlock had injured OBI's counsel when he inappropriately touched him at the unemployment compensation benefits hearing? Under the Tenth Circuit's rule, Medlock would still be entitled to reinstatement (had he sought it) or front pay. Had Medlock, however, assaulted and injured his next-door neighbor (such that it could not be characterized as resulting from the termination), then Medlock would not be entitled to reinstatement or front pay.

By distinguishing between post-termination misconduct that flows from the termination and other post-termination misconduct, the Tenth Circuit's rule totally ignores the rationale behind the after-acquired evidence rule, *i.e.*, that an employer should not be ordered to reinstate or pay an individual's future lost earnings when the employer would have terminated the employee upon lawful grounds. In sum, there simply is no reason to distinguish between alleged misconduct occurring as a result of the termination and other post-termination misconduct.

If the Court rejects the Tenth Circuit's rule and extends *McKennon* to post-termination conduct of this type, there is no question that OBI was entitled to the *McKennon*-type jury instruction it requested. Medlock's display of violence and shouting of obscenities were clear

grounds for discharge – particularly since Medlock previously had been warned and counseled about his profane telephone calls, angry remarks, and physical threats that were directed toward OBI's management and staff. Had Medlock's profane and violent behavior occurred *prior to* termination, it would unquestionably have been both inequitable and pointless for the Court to order OBI to reinstate Medlock, knowing that OBI would have appropriate grounds to terminate his employment. The same is true here, where the display of violence and vulgarities occurred *after* his termination. It would be just as unfair and pointless to order Medlock reinstated when OBI should have, and would have, terminated him for that conduct.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Oliver MEDLOCK, Jr., Plaintiff-Appellee,

v.

ORTHO BIOTECH, INC.,
Defendant-Appellant,

and

Johnson & Johnson Companies, Ortho Pharmaceutical Corp., William C. Pearson, III, W. Thomas Amick, James A. Moreland, Richard W. Zahn, C. Daniel Smith, Craig Manjean and Carol Webb, Defendants.

Equal Employment Advisory Council,
Amicus Curiae.

No. 97-3037.

United States Court of Appeals,
Tenth Circuit.

Jan. 5, 1999.

David J. Waxse (Barbara A. Harmon with him on the briefs) of Shook, Hardy & Bacon, L.L.P., Overland Park, Kansas, for the Defendant-Appellant.

Alan V. Johnson of Sloan, Listrom, Eisenbarth, Sloan & Glassman, L.L.C., Topeka, Kansas, for the Plaintiff-Appellee.

Robert E. Williams, Ann Elizabeth Reesman, and Jennifer Nicole Long of McGuiness & Williams, Washington, D.C., filed an amicus curiae brief for the Equal Employment Advisory Council.

Before BRISCOE, McWILLIAMS and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

After a seven-day trial, a jury found that Ortho Biotech, Inc. ("OBI") had terminated Oliver Medlock, Jr. in retaliation for his filing and pursuing a claim of discrimination based on race in violation of Title VII. The questions we must resolve on appeal are: (1) did Medlock present sufficient evidence to support the jury's finding of retaliatory discharge as well as its award of punitive damages; (2) did the district court err in administering a mixed motives instruction to the jury; (3) did the verdict form allow the jury to erroneously disregard after-acquired evidence on which OBI could have legitimately relied to terminate plaintiff; (4) did the district court abuse its discretion in refusing to instruct the jury that its determination of damages could consider plaintiff's conduct after his termination; (5) did the district court err in refusing to reduce the award for future loss of compensation under 42 U.S.C. § 1981a(b)(3); and, finally, (6) did the district court err in awarding plaintiff attorney fees? We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

I

Plaintiff began working for OBI in June 1989. In 1991, shortly after a meeting at which plaintiff learned that a scheduled salary increase was going to be postponed for six months, plaintiff called his division manager, C. Daniel Smith, and irately expressed his dissatisfaction with various aspects of his job, including his level of pay. Smith submitted a memo concerning the conversation to his superior, William Pearson, III, describing plaintiff as

"very angry and hostile about the way that he has and is being managed with Ortho Biotech." II Appellant's App. at 334-35.

In February 1992, plaintiff confronted Pearson after a sales meeting. During that discussion, Medlock accused Pearson of building a file of inaccurate information about him and threatened to harm him physically if he continued to do so. Later that month, Pearson met with his superiors to discuss his confrontation with plaintiff. Although Pearson recommended that plaintiff be terminated for violating company rules, OBI management decided to investigate the matter further and no action was taken at that time.

The next month, plaintiff contacted Smith again. According to Smith, plaintiff barraged him with obscenities. Smith used his dictation equipment to record the conversation. He later played the tape for Pearson, and then sent Pearson a memorandum stating that Medlock "is becoming more difficult to manage because of his BAD attitude and his dislike for Ortho Biotech and our policies. I feel that Oliver should be put on formal warning or terminated as soon as possible." II Appellant's App. at 403.

That same day, Pearson submitted a memorandum to upper management describing the continuing difficulty he was having with plaintiff and recommending they take "immediate action to resolve this situation." *Id.* at 402. Shortly thereafter, plaintiff met with representatives of OBI's upper management. They discussed plaintiff's job performance and his altercation with Pearson in February of that year. Although Medlock's version of that story did

not vary greatly from Pearson's, management decided to give him another chance.

Plaintiff continued to express his dissatisfaction with his compensation, and ultimately filed administrative charges with the Equal Employment Opportunity Commission in December 1993. Among other claims, plaintiff alleged that his compensation was the product of racial discrimination. In August 1994, plaintiff filed suit in district court claiming racial discrimination along with numerous other causes of action. One month after his deposition in that suit was taken, plaintiff was suspended by OBI and, a month after that, he was terminated. He subsequently added to his complaint a claim for retaliatory discharge in violation of Title VII.

Defendant prevailed on all claims except one – the jury found that OBI terminated plaintiff in retaliation for his filing and pursuing his race discrimination claim under Title VII. Though OBI contends that it had legitimate nondiscriminatory reasons for terminating plaintiff in the light of new information it learned during plaintiff's deposition, the jury nevertheless found by a preponderance that plaintiff was terminated for reasons of retaliation.

II

After trial, defendant moved for judgment as a matter of law ("JMOL") on the ground that plaintiff had not adduced sufficient evidence to support a finding of retaliatory discharge in violation of Title VII. We review the district court's denial of that motion de novo. *See Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1450 (10th

Cir.1997). In determining whether the district court's refusal to grant JMOL constitutes error, "[w]e do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for that of the jury." *Id.* (internal quotation omitted). Rather, we may only reverse "if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Id.*[1]

A

Under 42 U.S.C. § 2000e-3(a), it is unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII. To prevail on a retaliatory discharge claim, a plaintiff must establish that the decision to terminate her resulted from retaliatory animus. A plaintiff may meet that burden in two ways. Typically, a plaintiff will rely on the familiar framework enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), under which the plaintiff bears the initial burden of establishing a prima facie case of discrimination. If the defendant is able to

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[1] Defendant also asserts that it was error for the district court to deny its motion for summary judgment prior to trial. This argument is without merit. Even if we agreed with defendant that summary judgment was erroneously denied, " 'the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law . . . and appellate review of those motions if they were denied.' " *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir.1998) (*quoting Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir.1992)).

articulate a legitimate nondiscriminatory reason for the adverse action, the plaintiff must then show that the articulated reasons are a pretext for retaliation. However, the plaintiff may also establish discrimination directly, in which case the McDonnell Douglas framework is inapplicable. *See Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557-58, 560 (10th Cir.1996).

To prevail via this direct method, a plaintiff must introduce direct or circumstantial evidence that the alleged retaliatory motive "actually relate[s] to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace." *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C.Cir.1997) ("NFLPA"); *see also Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir.1997) (holding that plaintiff may prove discriminatory motive by "presenting 'evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [retaliatory] attitude' " (*quoting Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1471 n. 5 (10th Cir.1992)) (emphasis added)); *Greene*, 98 F.3d at 560 (holding that plaintiff may establish age discrimination "directly, by presenting direct or circumstantial evidence that age was a determining factor in his discharge"). Defendant argues that "[n]o evidence was presented at trial that plaintiff's filing and pursuit of his discrimination charge was a 'motivating factor' in the decision to terminate him." Appellant's Br. at 22. We disagree.

One month after plaintiff's deposition, during which he testified about his race discrimination claim, defendant sent a letter to plaintiff, stating: "As a result of issues raised in your deposition, effective immediately, you are suspended from all duties on behalf of the Company." Appellant's Add.App. at 3011. In a letter explaining the reasons for plaintiff's termination shortly thereafter, defendant states: "During the entire term of your employment, you have communicated your deep dissatisfaction with your compensation to Ortho Biotech management and Ortho Biotech human resources personnel." *Id.* at 3012. On its face, defendant's suspension letter admits that defendant considered the subject matter of plaintiff's deposition in its decision to terminate him, a deposition which included testimony about his Title VII race discrimination claim. The termination letter explicitly references plaintiff's communication of his dissatisfaction with his compensation. Taken in the light most favorable to plaintiff, we must conclude the letters, coupled with the close temporal proximity between plaintiff's deposition and firing, directly support the jury's finding that defendant terminated plaintiff in retaliation for his pursuit of his Title VII race discrimination claim.

Defendant argues that, notwithstanding the language in its letters to Medlock, it is entitled to JMOL because no reasonable jury could reject the nondiscriminatory reasons on which it purportedly relied to terminate plaintiff. According to defendant, it only decided to discharge plaintiff after learning during his deposition and the discovery process that: (1) he had secretly taped numerous private telephone conversations with co-workers; (2) he had thoughts about doing serious bodily harm to his

supervisors; (3) he frequently used vulgarities and was prone to excessive anger; (4) he had made disparaging remarks about the company to customers; and (5) he had disclosed confidential information to OBI's competitors. The jury rejected these arguments, finding that defendant would not have terminated plaintiff in the absence of retaliatory animus.[2]

Once plaintiff presented evidence that retaliation played a motivating part in defendant's decision to discharge him, it became defendant's burden to prove by a preponderance that it "would have made the same decision" notwithstanding its retaliatory motive. *Denny's*, 111 F.3d at 1511 (*quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), *overruled in part* by 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (providing broader remedies for plaintiff who demonstrates unlawful criterion was "motivating factor" in adverse employment decision)).[3] If the defense does not carry that burden, the plaintiff will prevail. *See NFLPA*, 131 F.3d at 203 (citing *Price Waterhouse*, 490 U.S. at 276, 109 S.Ct. 1775 (O'Connor, J., concurring)).

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[2] Though defendant challenges the meaning of this provision of the special verdict, we conclude that the jury's verdict is properly understood as a finding that defendant would not have terminated plaintiff in the absence of retaliatory motive. *See infra* part III.B.

[3] Because the statutory overruling of Price Waterhouse does not alter the respective burdens of plaintiff and defendant in a mixed motive case, but only changes the remedies available when both parties meet their burden, *see infra* part III & n. 5, our analysis of those burdens is unchanged by the 1991 amendments.

It is true that defendant presented numerous grounds at trial upon which it claims it would have terminated plaintiff's employment. However, the jury was fully entitled not to find this evidence credible. Given our conclusion that the suspension and termination letters in conjunction with the timing of plaintiff's suspension and ultimate discharge constitute direct evidence of retaliatory animus, disbelief of defendant's proffered justifications is not unreasonable. *See Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1396 n. 5 (10th Cir.1997) (noting that direct evidence may go to prove that employer's reasons are pretextual and therefore unworthy of belief); *accord Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 462 (9th Cir.1987); *see also* 1 Lex K. Larson, Employment Discrimination § 8.07, at 8-109 (2d ed.1998) (noting that plaintiffs proceeding under McDonnell Douglas framework may use direct evidence to show pretext). Were we the triers of fact, we might have evaluated the evidence differently. In reviewing a denial of JMOL, however, it is well established that "[t]he jury . . . has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact." *Thunder Basin Coal Co. v. Southwestern Pub. Serv. Co.*, 104 F.3d 1205, 1212 (10th Cir.1997) (internal quotations omitted). Consequently, we conclude there is sufficient evidence to support the jury's verdict.

B

Defendant also contends that the evidence was insufficient to support the jury's finding of punitive damages.

Although a jury is never required to award punitive damages, *see Smith v. Wade*, 461 U.S. 30, 52, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983), a plaintiff may receive such an award if it demonstrates that defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. § 1981a(b)(1). The purpose of punitive damages is "to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

This court has not had occasion to determine comprehensively what burden a plaintiff must carry to prove "malice or reckless indifference to . . . federally protected rights" within the meaning of § 1981a(b)(1). This case, however, does not require our eliciting that standard in any analytic detail. Plaintiff has produced evidence sufficient to prove retaliation. He has also adduced evidence that in the very letter effecting his retaliatory discharge, his employer expressly acknowledged plaintiff's "protected legal rights to pursue a lawsuit against the Company without retaliation." Appellant's Add.App. at 3013. We have no doubt that the jury was well within the bounds of reason in determining such conduct to manifest reckless indifference to plaintiff's federally protected rights.

III

OBI argues that we must reverse because the district court erred in instructing the jury. It claims three specific errors: (1) the jury should have been given a McDonnell Douglas as opposed to a mixed motive instruction; (2) the

verdict form improperly required the jury to hold against defendant for discharging plaintiff based on information it learned during discovery; and (3) the district court failed to instruct the jury that defendant's damages could be limited based on events that took place after his termination. We review the district court's decision to give a particular instruction for abuse of discretion. *See Denny's*, 111 F.3d at 1509. To determine whether the jury was adequately instructed on the applicable law, we review the instructions in their entirety de novo to determine whether the jury was misled in any way. *See Coleman v. B-G Maintenance Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1202 (10th Cir.1997). The instructions as a whole need not be flawless, but we must be satisfied that, upon hearing the instructions, the jury understood the issues to be resolved and its duty to resolve them. *See Brodie v. General Chem. Corp.*, 112 F.3d 440, 442 (10th Cir.1997).

A

Defendant contends that the district court erred by giving the jury a "motivating factor," or "mixed motive," instruction on plaintiff's Title VII retaliation claim. Defendant asserts that the court should instead have required Medlock to show pretext under the familiar McDonnell Douglas framework. *See* 411 U.S. at 802-05, 93 S.Ct. 1817. Its argument is two-fold. First, it argues that 42 U.S.C. § 2000e-2(m), which was added to Title VII pursuant to the Civil Rights Act of 1991 and which codifies the motivating factor standard, does not apply to retaliation cases. Therefore no mixed motivation instruction should have been given unless the case met the standard for such instructions enunciated in *Price Waterhouse v. Hopkins*, 490

U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Second, it claims that under the Price Waterhouse standard it was not appropriate to instruct the jury on mixed motives in this case.

Section 107(a) of the Civil Rights Act of 1991, now codified at 42 U.S.C. § 2000e-2(m), overruled the Supreme Court's decision in Price Waterhouse to the extent that that decision holds an employer can avoid a finding of liability by proving it would have taken the same action even absent the unlawful motive. *Compare* 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice") *with Price Waterhouse*, 490 U.S. at 258, 109 S.Ct. 1775 (holding defendant may avoid finding of liability by proving that it would have made the same decision even in the absence of unlawful motive). Thus, the Civil Rights Act of 1991 does not create the mixed motive standard. Instead, the Act expands the relief available to a plaintiff who demonstrates that an unlawful criterion played a motivating part in an employment decision, even though the employer shows that it would have made the same decision regardless. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Furthermore, the Act does not address what type of evidence is required to meet this standard and so warrant a mixed motive instruction. Consequently, we agree with defendant that Price Waterhouse continues to control when a

mixed motive instruction is appropriate.[4] *See Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir.1995).

Once a plaintiff proves that retaliation played a motivating part in an employment decision, the burden shifts to defendant to demonstrate by a preponderance of the evidence that it would have made the same decision even if it had not taken the retaliatory motive into account. *See Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775 (plurality opinion); *Kenworthy*, 979 F.2d at 1470-71; *accord* 42 U.S.C. § 2000e-5(g)(2)(B). A mixed motive instruction is therefore appropriate in any case " 'where the evidence is sufficient to allow a trier to find both forbidden and permissible motives.' " *Denny's*, 111 F.3d at 1512 (*quoting Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181 (2d Cir.1992)). Because we have already concluded that the suspension and termination letters along with the timing of plaintiff's discharge directly reflect defendant's retaliatory animus, we must also conclude

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[4] Defendant claims that, by its plain language, 42 U.S.C. § 2000e-2(m) does not apply to retaliation cases. *See McNutt v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 706, 709 (7th Cir.1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 933-35 (3d Cir.1997); *Tanca v. Nordberg*, 98 F.3d 680, 685 (1st Cir.1996). *But see* 2 Larson, Employment Discrimination § 35.04[1], at 35-25 (noting that the EEOC interprets this section to apply to retaliation claims). Because we conclude that Price Waterhouse and its progeny control our analysis of whether it is appropriate to give a mixed motive instruction in any given case, we need not resolve this issue. We would, of course, be obliged to reach the issue had the jury concluded defendant would have terminated Medlock even in the absence of a retaliatory motive. But the jury specifically found otherwise. *See infra* note 5.

that the jury could reasonably have found both "forbidden and permissible motives" for defendant's decision. *Id.* We therefore conclude that the district court did not abuse its discretion by instructing the jury on mixed motive.

B

Defendant next argues that, even if it was appropriate to instruct the jury on mixed motive, the verdict form misled the jury by effectively instructing that defendant could not rely on information it obtained during the discovery process to discharge plaintiff. The verdict form stated that if the jury found OBI terminated plaintiff's employment in retaliation for his filing and pursuing charges of race discrimination, it was also required to determine whether OBI would have discharged plaintiff "even in the absence of his filing and pursuing charges of race discrimination." III Appellant's App. at 800. Defendant suggests that the jury could not help but answer that question in the negative because the company's asserted justifications for discharging plaintiff were all learned during the discovery process.

"No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.P. 51. Because the purpose of the objection is to give the court an opportunity to correct any mistake before the jury enters deliberations, *see, e.g., Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066,

1069 (1st Cir.1990), an excessively vague or general objection to the propriety of a given instruction is insufficient to preserve the issue for appeal. Here, although defendant objected generally to the propriety of giving a mixed motive instruction, *see* IX Appellant's App. at 2734, it did not object to the language in the verdict form that it now claims is misleading. Our review of the disputed verdict form is therefore limited to whether it was "patently plainly erroneous and prejudicial." *Zimmerman v. First Fed. Sav. & Loan Ass'n*, 848 F.2d 1047, 1054 (10th Cir.1988) (internal quotation omitted). Only rarely will we reverse based on allegedly erroneous instructions to which there was no objection at trial; the party claiming plain error has "the heavy burden of demonstrating fundamental injustice." *Id.* (internal quotation omitted).

We discern no such error here. Based on our review, the instructions conveyed the appropriate standard to the jury regarding plaintiff's burden to demonstrate that retaliatory animus was a "motivating factor" in OBI's decision to terminate him.[5] If the jury found that plaintiff

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[5] Again, we need not determine whether 42 U.S.C. § 2000e-2(m) applies because the "motivating factor" standard also applies under *Price Waterhouse*. *See* 490 U.S. at 250, 109 S.Ct. 1775 (plurality opinion); *id.* at 274, 109 S.Ct. 1775 (O'Connor, J., concurring). Both the 1991 amendments to Title VII and Price Waterhouse shift the burden to the employer to prove it would have taken the same action even in the absence of the unlawful motive. Compare 42 U.S.C. § 2000e-5(g)(2)(B) with Price Waterhouse, 490 U.S. at 258, 109 S.Ct. 1775 (plurality opinion). The only difference between the Price Waterhouse standard and § 2000e-2(m) is the legal consequence of a finding that the employer would have taken the same action even in the absence of the unlawful motive. Under *Price Waterhouse*, the defendant

met his burden, the instructions correctly required defendant to show by a preponderance that it would have taken the same action "in the absence of the unlawful motive." III Appellant's App. at 761. In addition, the instructions clearly state that should the jury find defendant had made such a showing, it should mark the verdict form accordingly. *See id.*[6] In contrast, the verdict form first asks whether the jury found that OBI fired plaintiff in retaliation for his "filing and pursuing charges of race discrimination." *Id.* at 799. Because the jury answered that question affirmatively, it was also required to determine whether OBI would have made the same decision even in the absence of the retaliatory motive. Rather than using the term "retaliatory motive," however, the verdict form simply parallels its own language in the question regarding liability – i.e., whether defendant would have taken the same action even in the absence of plaintiff's "filing and pursuing charges of race discrimination." *Id.* at 800.

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avoids a finding of liability altogether. *See* 490 U.S. at 258, 109 S.Ct. 1775 (plurality opinion); *id.* at 261, 109 S.Ct. 1775 (O'Connor, J., concurring). Under the 1991 amendments, defendant is still liable but plaintiff is limited in what forms of relief she may receive. *See* 42 U.S.C. § 2000e-5(g)(2)(B). This difference is of no consequence in the present case because the jury found that defendant had not shown it would have discharged plaintiff absent retaliatory motive. Thus, we need not decide whether the jury should have been instructed that such a showing would absolve defendant of liability or would only limit the relief to which plaintiff was entitled.

[6] Defendant concedes that the mixed motive instruction to the jury correctly set forth defendant's obligation to show it would have taken the same action in the absence of the unlawful motive. *See* Appellant's Br. at 42.

Defendant is correct that it may rely on information obtained during the discovery process in making employment decisions so long as it does not do so as a pretext for discrimination or retaliation. *See Hetreed v. Allstate Ins. Co.*, 135 F.3d 1155, 1157-58 (7th Cir.1998); *cf. McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) (holding that information obtained during discovery about employee misconduct that would have justified termination had it been known at the time may limit remedies available to plaintiff). The verdict form, however, does not plainly state the contrary. Read as a whole and in conjunction with the instructions on retaliatory discharge, the verdict form may readily be understood to require the jury to determine whether OBI would have made the same decision in the absence of a retaliatory motive, which is the correct standard for a mixed motive case. *See Denny's*, 111 F.3d at 1511-12; 42 U.S.C. § 2000e-5(g)(2)(B). Because we cannot conclude that the verdict form was interpreted in the manner defendants suggest, we cannot hold it "patently plainly erroneous."

C

Defendant claims the district court erred in refusing to instruct that plaintiff's conduct after he had been terminated could serve to limit damages if defendant showed that the conduct "was of such severity that the Plaintiff in fact would have been terminated on those grounds alone." *See* Appellant's Br. at 44 (quoting III Appellant's App. at 735). In support of this argument, defendant points to the *McKennon* decision. *See* 513 U.S. at 362, 115 S.Ct. 879 (holding that evidence of employee

misconduct occurring during tenure with employer but not discovered until after termination may be used to limit relief if employer can demonstrate that prior conduct was so severe that it would have discharged employee on those grounds alone). Defendant asserts that the logic of *McKennon* extends to conduct of an employee after he has been discharged. We review the district court's refusal to give an instruction on after-occurring evidence for abuse of discretion. *See Denny's*, 111 F.3d at 1509.

Under *McKennon*, information that an employer learns after it has discharged an employee is not relevant to the determination of whether an employer violated Title VII because it necessarily played no role in the actual decision. *See* 513 U.S. at 358-60, 115 S.Ct. 879. Nevertheless, if an employer learns of employee wrongdoing after it has fired that employee, and it can prove that the "wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge," the employee may not obtain front pay or reinstatement and may also be denied backpay to which she would otherwise be entitled. *Id.* at 361-62, 115 S.Ct. 879. According to the Court, it would not comport with the "employer's legitimate concerns" to ignore evidence of misconduct on the part of the employee. *See id.* at 361, 115 S.Ct. 879.

Although *McKennon* states as a general rule that front pay and reinstatement are not appropriate remedies where there is after-acquired evidence of pre-termination wrongdoing, the Court was careful to state that "[t]he proper boundaries of remedial relief in the general class

of cases where, after termination, it is discovered that the employee has engaged in wrongdoing must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case." *Id.; see also id.* at 362, 115 S.Ct. 879 ("In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.").

Defendant argues that it would have terminated plaintiff on the basis of his post-termination conduct at his unemployment compensation benefits hearing, during which he "touched and cursed at Defendant's counsel." Appellant's Br. at 43. Although we do not foreclose the possibility that in appropriate circumstances the logic of McKennon may permit certain limitations on relief based on post-termination conduct, *see* Christine Neylon O'Brien, *The Law of After-Acquired Evidence in Employment Discrimination Cases: Clarification of the Employer's Burden, Remedial Guidance, and the Enigma of Post-Termination Misconduct*, 65 UMKC L.Rev. 159, 174 (1996) (concluding that egregious post-termination misconduct should ordinarily bar reinstatement and curtail backpay), we cannot conclude that the district court abused its discretion in refusing to adopt defendant's proffered instruction. The alleged misconduct to which defendant points occurred at a hearing occasioned by plaintiff's termination. In this case, as in most cases in which the alleged misconduct arises as a direct result of retaliatory termination, the necessary balancing of the equities hardly mandates a

McKennon-type instruction on after-occurring evidence.[7] Consequently, the failure to give such an instruction is not reversible error.

IV

Under 42 U.S.C. § 1981a, "[t]he sum of the amount of compensatory damages awarded . . . for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded . . . shall not exceed" $200,000 against a defendant, like OBI, who has more than 200 and fewer than 501 employees. *See* 42 U.S.C. § 1981a(b)(3)(C). Defendant claims that plaintiff's damages award, which included $100,000 in compensatory damages, $185,132 in front pay, $75,000 for mental anguish, emotional pain, loss of enjoyment of life, and inconvenience, and $100,000 in punitive damages, exceeds the applicable cap.[8] Plaintiff responds

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[7] It is not difficult to envision a defendant goading a former employee into losing her temper, only to claim later that certain forms of relief should be unavailable because it would have discharged the plaintiff based on her inability to control her temper.

[8] The verdict form required the jury to determine Medlock's entitlement to "[f]uture damages." *See* III Appellant's App. at 799. Appellee contends that the $185,153.62 awarded on this basis constitutes "front pay." Appellee's Br. at 39. The record supports this contention. "Front pay refers to the award of money as compensation for the future loss of earnings." *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997 (10th Cir.1994). The court instructed the jury that it could award "future damages for the wages and benefits that he would have earned during the period from the date of your verdict until the date when

that, because front pay is not appropriately considered under § 1981a, the district court committed no error in refusing to reduce his damage award to $200,000. Whether "future pecuniary losses" includes an award of front pay is an issue of law that we review de novo. *See Southern Ute Indian Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 820 (10th Cir.1997).

At least one court has made this determination by looking to the "ordinary, contemporary, common meaning" of the phrase "future pecuniary losses," then construing this meaning to be broad enough to cover front pay. *See Hudson v. Reno*, 130 F.3d 1193, 1203-04 (6th Cir.1997) (citation omitted). This approach, however, fails to understand the relevant statutory terms "in light of the language and structure of the Act as a whole." *Dole v. United Steelworkers of America*, 494 U.S. 26, 41, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990).

Under § 1981a(b)(2), Congress expressly excludes certain forms of relief from the "compensatory damages" cap listed in 42 U.S.C. § 1981a(b)(3)(C). These exclusions include "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]." An award of front pay fits squarely within this list of exclusions

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plaintiff would have voluntarily resigned from Ortho Biotech, Inc., or obtained other employment," III Appellant's App. at 768, and that its calculation must be based on "the total amount of any anticipated future loss of compensation," discounted to present value over "the number of years over which the future loss is reasonably certain to be sustained," *id.* at 769. No other "future damages" instruction was provided. Under these circumstances, we are satisfied that the verdict form's reference to "future damages" signifies front pay only.

because it constitutes "other equitable relief" that "the court may grant if deemed appropriate" pursuant to 42 U.S.C. § 2000e-5(g).[9] *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1561 (10th Cir.1989); *see also* 5 Larson, Employment Discrimination § 93.03, at 93-11 ("[T]he sweeping exemption for 'any other type of relief authorized under section 706(g)' of Title VII will likely compel the courts to exclude traditional front pay" from the definition of "future pecuniary loss"). Thus, even though "future pecuniary losses" could be understood to include front pay, the statute makes clear that the term is not to be understood in that fashion – or at least not for the purposes of determining the amounts subject to the § 1981a(b)(3)(C) compensatory damages cap. Consequently, the district court committed no error in refusing to reduce plaintiff's damages.

V

Finally, because we affirm the judgment of the district court, defendant's claim that plaintiff is no longer entitled to attorney fees as a prevailing party is necessarily without merit.

AFFIRMED.

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[9] This circuit allows an equitable award of front pay in lieu of reinstatement even when the plaintiff does not seek reinstatement in the pleadings in order "to achieve the broad purpose of eliminating the efforts of discriminatory practices and restoring the plaintiff to the position that she would have likely enjoyed had it not been for the discrimination." *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir.1980).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER MEDLOCK, JR., Plaintiff, v. **JOHNSON AND JOHNSON COMPANIES, et al.,** Defendants.	**Case No. 94-2317-JWL** **(Filed Oct. 7, 1996)**

MEMORANDUM AND ORDER

This matter is presently before the court on a motion by defendant Ortho Biotech, Inc. (OBI) for judgment as a matter of law or alternatively for a new trial (Doc. #178). For the reasons set forth below, the court denies the motion.

I. Judgment as a Matter of Law

Judgment as a matter of law under Fed. R. Civ. P. 50(b) "should be cautiously and sparingly granted." *Lucas v. Dover Corp.*, 857 F.2d 1397, 1400 (10th Cir. 1988). The jury's verdict must be affirmed if, "viewing the record in the light most favorable to [the nonmoving party], there is evidence upon which the jury could properly return a verdict for [the nonmoving party]." *Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir. 1996), *pet. for cert. filed*, 65 U.S.L.W. 3110 (U.S. Aug. 5, 1996). A court does not weigh the evidence pass on the credibility of the witnesses, or substitute its conclusions

for those of the jury. *Id.* On the other hand, judgment as a matter of law must be granted if there is no legally sufficient evidentiary basis with respect to a claim or defense under the controlling law. *Id.* at 1546-47 (citing Fed. R. Civ. P. 50(a)). A legally sufficient basis requires more than "a scintilla of evidence" favoring the nonmoving party. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988).

OBI argues that it is entitled to judgment as a matter of law because the evidence at trial was not legally sufficient to support the jury's verdict in favor of plaintiff Oliver Medlock on his Title VII retaliation claim.[1] The court instructed the jury that, in order for Mr. Medlock to recover on that claim, he had to prove that his filing and pursuing a claim of discrimination was a motivating factor in OBI's decision to terminate him.

The court concludes that the evidence supporting the jury's verdict for Mr. Medlock on this claim was legally sufficient. The Tenth Circuit has held that, under a "motivating factor" analysis, "protected conduct closely followed by adverse action may justify an inference of retaliatory motive." *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert. denied*, 116 S. Ct. 2552 (1996). Here, OBI's termination of Mr. Medlock closely followed his participation in depositions taken concerning his race discrimination claim against OBI. OBI contends that *Marx*

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[1] OBI also states that it renews the rule 50 motions that it made at trial, but it does not offer additional analysis or even state the bases for those motions. Accordingly, for the reasons stated by the court at trial, OBI's present motion is denied with respect to any such issues.

does not apply because Mr. Medlock first asserted his discrimination claim 20 months before the termination. Nevertheless, the termination did closely follow Mr. Medlock's *pursuit* of his claim, and *Marx* therefore controls.[2]

Moreover, unlike *Marx*, the present case involved additional evidence of a retaliatory motive. In particular, Mr. Medlock points to the letter from the human resources director suspending him "[a]s a result of issues raised in your deposition," and the termination letter from OBI's president, which referred to Mr. Medlock's complaints about his compensation (which had formed the basis for his discrimination claim). Together, the timing and the letters raise the inference that retaliation was at least a motivating factor in OBI's decision. Therefore, viewed in the light most favorable to Mr. Medlock, the evidence supports the jury's verdict on the retaliation claim.

The court also rejects OBI's assertion that the evidence was insufficient to support the jury's finding that OBI would not have terminated Mr. Medlock in the absence of his filing and pursuing his discrimination claim. Given the evidence discussed above, the jury's

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[2] OBI stresses that *Marx* provides only that temporal proximity *may* justify an inference of retaliation but doesn't necessarily demand such an inference. OBI is mistaken, however, when it suggests that, by denying its motion, the court would make the inference mandatory and prevent employers from ever terminating an employee who had recently alleged discrimination. If the inference had been mandatory, summary judgment would have been appropriate in favor of Mr. Medlock. Instead, the case went to the jury, who *could* – and did – infer a retaliatory motive.

decision to discredit OBI's stated reasons for terminating Mr. Medlock was not without sufficient basis.

OBI also argues that it is entitled to judgment as a matter of law on Mr. Medlock's claim for punitive damages. This argument too is without merit. The jury was instructed that an award of punitive damages required a finding that OBI "acted with malice or reckless indifference to [Mr. Medlock's] right not to be retaliated against for engaging in protected activity." *See Fitzgerald v. Mountain States Telephone & Telegraph Co.*, 68 F.3d 1257, 1263 (10th Cir. 1995) ("The federal standard in this circuit for imposition of punitive damages in civil rights cases requires that the discrimination must have been malicious, willful, and in gross disregard of plaintiff's rights."). The court concludes that the evidence was sufficient to place this question within the province of the jury.[3]

II. New Trial

Motions for a new trial are committed to the sound discretion of the trial court. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S. Ct. 845, 850 (1984); *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993). They are "not regarded with favor and should

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[3] OBI correctly notes that a finding of liability under Title VII does not compel an award of punitive damages. That is not to say, however, that the evidence supporting liability cannot also suffice to meet the punitive damages standard.

only be granted with great caution." *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir.), *cert. denied*, 502 U.S 926 (1991).

In reviewing a motion for a new trial the court must view the evidence in the light most favorable to the prevailing party. *Griffin v. Strong*, 983 F.2d 1544, 1546 (10th Cir. 1993). A new trial based upon an error of law is unwarranted unless that error affected the substantial rights of the parties. Fed. R. Civ. P. 61; *Heyen v. United States*, 731 F. Supp. 1488, 1489 (D. Kan. 1990), *aff'd*, 945 F.2d 359 (10th Cir. 1991). "The party seeking to set aside a jury verdict must demonstrate trial error which constitutes prejudicial error or that the verdict is not based on substantial evidence." *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir. 1983). The court should "ignore errors that do not affect the essential fairness of the trail." *McDonough Power Equip.*, 464 U.S. at 553, 104 S. Ct. at 848.

A. Verdict Against Weight of Evidence

The court first rejects OBI's contention that it is entitled to a new trial because the jury's verdict was against the weight of the evidence. A new trial is not warranted unless the verdict was "clearly, decidedly, or overwhelmingly" against the weight of the evidence. *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 525 (10th Cir. 1984). Again, the evidence was sufficient for submission to the jury, and the court will not disturb their decision.

B. Retaliation Instruction

OBI next asserts that the court committed prejudicial error in instructing the jury with respect to the retaliation claim. Instructions will be deemed adequate if they, as a whole, sufficiently advised the jury of the parties; contentions and the applicable law. *Id.* at 524. The instructions need not be flawless; rather, the question is "whether the jury was misled in any way and whether it had an understanding of the issues and its duty to decide those issues." *Street v. Parham*, 929 F.2d 537, 539 (10th Cir. 1991). Reversal is mandated only if the error in instructing the jury was prejudicial. *Id.* at 539-40.

OBI argues that a "motivating factor" instruction is not appropriate for Title VII retaliation claims because 42 U.S.C. § 2000e-2(m) (1994), in which that standard is found, does not specifically refer to retaliation. For the reasons stated by the court at trial when it first considered this argument, the court disagrees and concludes that a new trial is not warranted on this basis. *See* 2 Lex. K. Larson, *Employment Discrimination* § 35.04[1] (2d ed. 1996) ("motivating factor" clause in Title VII applies to retaliation claims); *see also Marx*, 977 F.2d at 329 (applying "motivating factor" standard to retaliation claim under the Fair Labor Standards Act). In particular, the court believes that the Tenth Circuit would in this case continue to apply similar standards for retaliation and other discrimination claims under Title VII.

OBI also argues that, even if the "motivating factor" standard may apply to retaliation claims, it does so only in "mixed motives" cases, not in "pretext cases." The court rejects this argument. The Tenth Circuit has stated

that a "mixed motives" case exists when circumstantial evidence demonstrates "that an improper factor was a substantial motivation in the challenged decision." *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1471 n.5 (10th Cir. 1992). There was sufficient evidence here that both proper and improper motives prompted Mr. Medlock's termination and that therefore, a "mixed motives" case was presented.

Finally, the court notes that the jury specifically found that OBI would not have terminated Mr. Medlock in the absence of a retaliatory motive, thereby rejecting the reasons offered by OBI for the termination. Thus, no prejudice can be shown from the court's failure to use a "pretext" instruction.

C. *After-Occurring Evidence Instruction*

OBI's final argument concerns the court's refusal to give an instruction concerning "after-occurring" evidence. The court concludes that it did not err in failing to give the requested instruction.

At trial, the court first excluded certain evidence of conduct by Mr. Medlock occurring after his termination, but the court later admitted the evidence after Mr. Medlock "opened the door" by putting on evidence of his peaceful nature. OBI sought an instruction that damages could be limited on account of that evidence. OBI relied on the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), in which the Court held that evidence of wrongdoing by an employee

occurring before the employee's termination but discovered after the termination does not bar the employee's discrimination claim. *Id.* at 883. The Court concluded that if the "after-acquired" evidence of wrongdoing would have caused the employee's termination if discovered earlier, the employee's relief could be limited; generally, the employee would not be entitled to reinstatement or front pay, and back pay would be limited to the time before the new information was discovered. *Id.* at 886.

The court does not agree that *McKenon* authorizes the instruction sought by OBI here. That case applies only in the event of wrongdoing occurring *before* the employee's termination. Thus, there was no basis for limiting possible damages, and the court did not commit prejudicial error by failing to give such an instruction.

IT IS THEREFORE ORDERED BY THE COURT THAT OBI's motion for judgment as a matter of law or alternatively for a new trial is denied.

IT IS SO ORDERED.

Dated this 4th day of October, 1996, at Kansas City, Kansas.

/s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

OLIVER MEDLOCK, JR., Plaintiff - Appellee,	)	
v.	)	
ORTHO BIOTECH, INC., Defendant - Appellant,	)	
and	)	No. 97-3037
JOHNSON & JOHNSON COMPANIES, ORTHO PHARMACEUTICAL CORP., WILLIAM C. PEARSON, III, W. THOMAS AMICK, JAMES A. MORELAND, RICHARD W. ZAHN, C. DANIEL SMITH, CRAIG MANJEAN and CAROL WEBB, Defendants.	)	
EQUAL EMPLOYMENT ADVISORY COUNCIL, Amicus Curiae.	)	

ORDER

Filed February 11, 1999

Before **BRISCOE, McWILLIAMS** and **LUCERO**, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ K. Schwalder
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER MEDLOCK, JR.,
Plaintiff,

v. Civil No: 94-2317-JWL

ORTHO BIOTECH, INC.,
WILLIAM C. PEARSON, III,
and CAROL WEBB,
Defendants.

JUDGMENT IN A CIVIL CASE

(Filed 96 Jul 26)

(x) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff Oliver Medlock Jr. take nothing from defendants Ortho Biotech, Inc. and William C. Pearson, II as to plaintiff's claim of race discrimination.

IT IS FURTHER ORDERED that judgment is entered in favor of plaintiff Oliver Medlock Jr. against defendant Ortho Biotech, Inc. as to plaintiff's retaliation claim in the amount of three hundred sixty thousand one hundred

fifty-three dollars and sixty-two cents ($360,153.62) as set forth below:

Loss of Compensation to date (back pay)	$100,000.00
Loss of future compensation reduced to present value (front pay)	$185,153.62
Mental anguish, humiliation, emotional pain, loss of enjoyment of life, and inconvenience	$ 75,000.00
TOTAL:	**$360,153.62**

IT IS FURTHER ORDERED that plaintiff Oliver Medlock, Jr. is granted punitive damages against defendant Ortho Biotech, Inc. as to plaintiff's retaliation claim in the amount of one hundred thousand dollars ($100,000.00).

IT IS FURTHER ORDERED that plaintiff Oliver Medlock, Jr. take nothing from defendants Ortho Biotech, Inc. and Carol Webb as to plaintiff's "whistle blowing" claim.

Dated: July 26, 1996

RALPH L. DeLOACH, Clerk

/s/ Sharon Scheurer
Sharon Scheurer,
Deputy Clerk

ENTERED ON THE DOCKET DATE: 7-26-96

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER MEDLOCK, JR., Plaintiff, vs. ORTHO BIOTECH INC., WILLIAM C. PEARSON III, W. THOMAS AMICK, AND CAROL WEBB, Defendants.	)	Case No. 94-2317-JWL (Filed June 13, 1996)

DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND VERDICT FORM

Respectfully submitted by,

SHOOK, HARDY & BACON L.L.P.

By /s/ David J. Waxse
DAVID J. WAXSE, #07357
BRETT D. LEOPOLD, #16229
PAUL W. REBEIN, #15899

40 Corporate Woods; Sixth Floor
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Suite 600
P.O. Box 25128
Overland Park, KS 66225
913/451-6060
TELEFAX: 451-8879

ATTORNEYS FOR DEFENDANTS
ORTHO BIOTECH INC.,
WILLIAM C. PEARSON III,
W. THOMAS AMICK, AND
CAROL WEBB

* * *

INSTRUCTION NO. ___

Plaintiff's second claim is that Ortho Biotech Inc. discharged him in retaliation for his filing charges with the EEOC and the KHRC, in violation of Title VII of the Civil Rights Act of 1964.

Title VII, at Section 2000e-3(a) of Section 42, United States Code, makes it unlawful for an employer to retaliate against an employee for exercising his or her rights under those statutes, including the filing of a charge of employment discrimination with the EEOC and similar state agencies.

In order for Plaintiff to prevail on his Title VII retaliation claim, Plaintiff must prove each of the following elements by a preponderance of the evidence:

(1) Plaintiff engaged in activity protected under Title VII by filing a charge under Title VII, based upon a reasonable belief that an unlawful employment practice had been or was occurring;

(2) Ortho Biotech Inc. was aware of the protected activity;

(3) Ortho Biotech Inc. took adverse action against Plaintiff after Plaintiff's protected activity;

(4) A causal connection existed between Ortho Biotech Inc.'s action and Plaintiff's protected activity;

(5) Ortho Biotech Inc.'s stated nonretaliatory reasons were not the true reasons for terminating Plaintiff's employment but were

only a pretext or excuse for retaliating against Plaintiff; and

(6) Plaintiff suffered damages as result thereof.

Plaintiff must prove each of these six elements by a preponderance of the evidence in order for you to return a verdict in his favor on his Title VII retaliation claim. If Plaintiff has failed to prove any of these elements by a preponderance of the evidence, then you must return a verdict in favor of Ortho Biotech Inc. on Plaintiff's Title VII retaliation claim.

Source: as given by the Honorable John W. Lungstrum in *Eslinger v. U.S. Central Credit Union,* CIV. A. No. 93-2406-JWL, Instruction No. 20 (modified); and in *Berry v. General Motors Corp.,* CIV. A. No. 88-2570-L, Instruction Nos. 23, 25 (modified).

* * *

INSTRUCTION NO. ___

An employer that is accused of terminating an employee for retaliatory reasons may rely upon evidence of inappropriate behavior occurring or discovered after the employee's termination to limit the amount of damages to which the employee is entitled.

In this case, the Defendants claim that the Plaintiff's behavior occurring or discovered after Plaintiff's termination would have caused Ortho Biotech Inc. to terminate the Plaintiff's employment if the Plaintiff had not already been discharged. The Defendants maintain that the Plaintiff may not recover for any lost wages and benefits or other damages that occurred after the Plaintiff exhibited this behavior or Defendants discovered it.

In order to limit the Plaintiff's damages based on this behavior, the Defendants must establish by a preponderance of the evidence that the Plaintiff's behavior was of such severity that the Plaintiff in fact would have been terminated on those grounds alone. If you find, by a preponderance of the evidence, that the Defendants would have fired the Plaintiff for this behavior, then you should not award Plaintiff for any damages that arose after the Plaintiff exhibited this behavior or Defendants discovered it.

Source: McKennan v. Nashville Banner Pub. Co., 115 S. Ct. 879, 886-87 (1995).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER MEDLOCK, JR.,	)	
Plaintiff,	)	
vs.	)	
ORTHO BIOTECH INC.,	)	Case No.
WILLIAM C. PEARSON III,	)	94-2317-JWL
W. THOMAS AMICK, AND	)	
CAROL WEBB,	)	
Defendants.	)	

DEFENDANTS' PROPOSED VERDICT FORM

We, the jury, duly impaneled and sworn, upon our oaths, present the following answers to the questions submitted by the Court.

1. RACE DISCRIMINATION CLAIM UNDER SECTION 1981

a. Do you unanimously find by a preponderance of the evidence that Defendant Ortho Biotech Inc. intentionally discriminated against Plaintiff Oliver Medlock, Jr., on the basis of his race with respect to his level of compensation between August 1992 and August 1995?

__ Yes __ No

b. Do you unanimously find by a preponderance of the evidence that Defendant William C. Pearson intentionally discriminated against Plaintiff Oliver Medlock, Jr., on the basis of his race with

respect to his level of compensation between August 1993 and August 1995?

__ Yes __ No

NOTE: If your answers to question 1a and 1b are "No," **DO NOT** answer questions 1c, 1d, 1e, 1f or 1g, but proceed to question 2. If, on the other hand, your answer to either question 1a or 1b is "Yes," proceed to question 1c.

c. What is the amount of damages, if any, which you unanimously find that Plaintiff Oliver Medlock, Jr., sustained as a direct result of the race discrimination by the Defendant(s)?

Loss of compensation from August 8, 1992 to August 15, 1995 $_____

Mental anguish $_____

d. If your answer to question 1a is "No," **DO NOT** answer question 1d or 1e, but proceed to question 1f. If your answer to question 1a is "Yes," do you find that punitive damages should be awarded against Defendant Ortho Biotech Inc. because of the race discrimination?

__ Yes __ No

e. If your answer to question 1d is "No," **DO NOT** answer question 1e but proceed to question 1f. If your answer to question 1d is "Yes," what amount of punitive damages, if any, do you award against Defendant Ortho Biotech Inc.?

$_____

f. If your answer to question 1b is "No," **DO NOT** answer question 1f or 1g, but proceed to question 2. If your answer to question 1b is "Yes," do you

find that punitive damages should be awarded against Defendant William C. Pearson?

__ Yes __ No

g. If your answer to question 1f is "No," **DO NOT** answer question 1g, but proceed to question 2. If your answer to question 1f is "Yes," what amount of punitive damages, if any, do you award against Defendant William C. Pearson?

$_____

2. RETALIATION CLAIM UNDER TITLE VII

a. Do you unanimously find by a preponderance of the evidence that Defendant Ortho Biotech Inc. terminated Plaintiff Oliver Medlock, Jr., in retaliation for his filing charges with the EEOC and KHRC?

__ Yes __ No

NOTE: If your answer to question 2a is "No," **DO NOT** answer questions 2b, 2c or 2d, but proceed to question 3. If, on the other hand, your answer to question 2a is "Yes," proceed to question 2b.

b. What amount of damages, if any, do you find that Plaintiff Oliver Medlock, Jr., sustained as a result of the retaliation by the Defendant Ortho Biotech Inc. for his filing charges with the EEOC and the KHRC?

Loss of compensation from August 15, 1995 to the present $_____

Future loss of compensation $_____

Mental anguish $_____

c. If your answer to question 2a is "No," **DO NOT** answer question 2c or 2d, but proceed to question 3. If your answer to question 2a is "Yes," do you find that punitive damages should be awarded?

__ Yes __ No

d. If your answer to question 2c is "No," proceed to question 3. If your answer to question 2c is "Yes," what amount of punitive damages, if any, do you award against Defendant Ortho Biotech Inc.?

$_____

3. **RETALIATION CLAIM UNDER KANSAS LAW**

a. Do you unanimously find by clear and convincing evidence that Defendant Ortho Biotech Inc. terminated Plaintiff Oliver Medlock, Jr., in retaliation for his reporting what he believed were violations of FDA regulations?

__ Yes __ No

b. Do you unanimously find by clear and convincing evidence that Defendant William C. Pearson terminated Plaintiff Oliver Medlock, Jr., in retaliation for his reporting of what he believed were violations of FDA regulations?

__ Yes __ No

c. Do you unanimously find by clear and convincing evidence that Defendant W. Thomas Amick terminated Plaintiff Oliver Medlock, Jr., in retaliation for his reporting what he believed were violations of FDA regulations?

__ Yes __ No

d. Do you unanimously find by clear and convincing evidence that Defendant Carol Webb terminated

Plaintiff Oliver Medlock, Jr., in retaliation for his reporting of what he believed were violations of FDA regulations?

__ Yes __ No

NOTE: If your answers to question 4a, 4b, 4c, and 4d are "No," **DO NOT** answer question 4e and 5 but simply have the foreperson sign the verdict form and your duties are over. If, on the other hand, your answer to question 4a, 4b, 4c, or 4d is "Yes," proceed to question 4e.

e. What amount of damages, if any, do you find that Plaintiff Oliver Medlock, Jr., sustained as a result of the retaliatory discharge by the Defendant(s)?

Loss of compensation from August 15, 1995 to the present $_____

Future loss of compensation $_____

Mental anguish $_____

f. If your answer to question 4a is "No," **DO NOT** answer question 4f, but proceed to question 4g. If your answer to question 4a is "Yes," do you unanimously find by clear and convincing evidence that punitive damages should be assessed against Defendant Ortho Biotech Inc.?

__ Yes __ No

g. If your answer to question 4b is "No," **DO NOT** answer question 4g, but proceed to question 4h. If your answer to question 4b is "Yes," do you unanimously find by clear and convincing evidence

that punitive damages should be assessed against Defendant William C. Pearson?

__ Yes __ No

h. If your answer to question 4c, is "No," **DO NOT** answer question 4h, but proceed to question 4i. If your answer to question 4c is "Yes," do you unanimously find by clear and convincing evidence that punitive damages should be assessed against Defendant W. Thomas Amick?

__ Yes __ No

i. If your answer to question 4d is "No," **DO NOT** answer question 4i, and have the foreperson sign the verdict form and your duties are over. If your answer to question 4d is "Yes," do you unanimously find by clear and convincing evidence that punitive damages should be assessed against Defendant Carol Webb?

__ Yes __ No

_____

Foreperson

Date:_____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, by U.S. Mail, postage prepaid, this 13th day of June, 1996 to:

Jay C. Hinkel
IRWIN, CLUTTER & SEVERSON
2201 S.W. 29TH STREET
P.O. BOX 5514
TOPEKA, KS 66605-0514

ALAN JOHNSON
SLOAN, LISTROM, EISENBARTH,
SLOAN & GLASSMAN
700 KANSAS AVENUE
TOPEKA, KS 66603

/s/ David J. Waxse

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER MEDLOCK, JR., plaintiff,	)	
v.	)	Case No. 94-2317-JWL
ORTHO BIOTECH, INC., WILLIAM C. PEARSON III, and CAROL WEBB, defendants.	)	

Jury Instructions

(Filed Jun. 28, 1996)

* * *

INSTRUCTION NO. 12

Plaintiff's second claim is that Ortho Biotech, Inc. discharged him in retaliation for his filing and pursuing charges of race discrimination in violation of Title VII of the Civil Rights Act of 1964. Title VII, at Section 2000e-3(a) of Section 42, United States Code, makes it unlawful for an employer to retaliate against an employee for exercising his or her rights under certain statutes, including the filing of a charge of employment discrimination with the EEOC and similar state agencies as well as the filing and pursuing of a lawsuit alleging employment discrimination.

In order for plaintiff to establish this claim against defendant Ortho Biotech, Inc., he has the burden of proving that Ortho Biotech, Inc.'s actions were, more likely than not, motivated by plaintiff's filing and pursuing a claim of discrimination.

In order for plaintiff to recover on his Title VII claim, he must prove by the preponderance of the evidence that Ortho Biotech, Inc. intentionally discriminated against plaintiff, that is, plaintiff's filing and pursuing a claim of discrimination must be proven to have been a motivating factor in Ortho Biotech, Inc.'s decision to terminate plaintiff.

A mere coincidence that plaintiff has filed and pursued a claim of discrimination and was terminated, if you should so find, is not sufficient, in and of itself, to establish plaintiff's claim under the law.

In showing that plaintiff's filing and pursuing a claim of discrimination was a motivating factor, plaintiff is not required to prove that his filing and pursuing such a claim was the sole motivation or even the primary motivation for Ortho Biotech, Inc.'s decision. Plaintiff need only prove that his filing and pursuing such a claim played a part in Ortho Biotech, Inc.'s decision even though other factors may also have motivated it.

If you find from the evidence that plaintiff's filing and pursuing a claim of discrimination was, more likely than not, a motivating factor in Ortho Biotech, Inc.'s decision to terminate plaintiff's employment, you should so indicate on the verdict form.

Ortho Biotech, Inc. claims that even if plaintiff's filing and pursuing a claim of discrimination was a motivating factor in its decisions, which they deny, it would still have taken the same action concerning plaintiff in the absence of the unlawful motive.

If you find that Ortho Biotech, Inc. would have, more likely than not, made the same decision to terminate plaintiff's employment even if the unlawful motive was not present, you should so indicate on the verdict form.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

OLIVER MEDLOCK, JR., plaintiff,	)	
v.	)	Case No. 94-2317-JWL
ORTHO BIOTECH, INC., WILLIAM C. PEARSON III, and CAROL WEBB, defendants.	)	

SPECIAL VERDICT

(Filed Jun. 28, 1996)

We, the jury, duly impaneled and sworn, upon our oaths, present the following answers to the questions submitted by the Court.

1. **RACE DISCRIMINATION CLAIM UNDER SECTION 1981**

   a. Do you unanimously find by a preponderance of the evidence that Defendant Ortho Biotech Inc. intentionally discriminated against Plaintiff Oliver Medlock, Jr., with respect to his level of compensation between August 1992 and August 1995?

   __ Yes X No

   b. Do you unanimously find by a preponderance of the evidence that Defendant William C. Pearson III intentionally discriminated against Plaintiff Oliver Medlock, Jr., with respect to his level of

compensation between August 1993 and August 1995?

__ Yes X No

NOTE: If your answers to questions 1a and 1b are "No," **DO NOT** answer question 1c, 1d, 1e, 1f, 1g, 1h or 1i but proceed to question 2. If, on the other hand, your answer(s) to questions 1a or 1b is "Yes," proceed to question 1c.

c. What is the amount of damages, if any, which you unanimously find that Plaintiff Oliver Medlock, Jr., sustained as a direct result of the race discrimination by the Defendant(s)?

Loss of compensation from August 8, 1992 to August 15, 1995 $_____

Mental anguish, humiliation, emotional pain, loss of enjoyment of life, and inconvenience $_____

d. If your answer to question 1a is "No," **DO NOT** answer question 1d, but proceed to question 1e. If your answer to question 1a is "Yes," would defendant Ortho Biotech Inc. have made the same decisions regarding plaintiff Oliver Medlock, Jr.'s level of compensation even in the absence of intentional discrimination?

__ Yes __ No

e. If your answer to question 1b is "No," **DO NOT** answer question 1e, but proceed to question 1f. If your answer to question 1b is "Yes," would defendant William C. Pearson III have made the same decisions regarding plaintiff Oliver Medlock, Jr.'s level of compensation even in the absence of intentional discrimination?

$_____

f. If your answer to question 1a is "No," **DO NOT** answer questions 1f or 1g, but proceed to question 1h. If your answer to question 1a is "Yes," do you find that punitive damages should be awarded against defendant Ortho Biotech, Inc.?

_ Yes _ No

g. If your answer to question 1f is "No," **DO NOT** answer question 1g but proceed to question 1h. If your answer to question 1f is "Yes," what amount of punitive damages, if any, do you award against defendant Ortho Biotech, Inc.?

$_____

h. If your answer to question 1b is "No," **DO NOT** answer questions 1h or 1i, but proceed to question 2. If your answer to question 1b is "Yes," do you find that punitive damages should be awarded against defendant William C. Pearson III?

_ Yes _ No

i. If your answer to question 1h is "No," **DO NOT** answer question 1i, but proceed to question 2. If your answer to question 1h is "Yes," what amount of punitive damages, if any, do you award against defendant William C. Pearson III?

$_____

2. RETALIATION CLAIM UNDER TITLE VII

a. Do you unanimously find by a preponderance of the evidence that Defendant Ortho Biotech, Inc. terminated plaintiff Oliver Medlock, Jr., in retaliation for his filing and pursuing charges of race discrimination?

X Yes __ No

NOTE: If your answer to question 2a is "No," **DO NOT** answer questions 2b, 2c, 2d, or 2e but proceed to question 3. If, on the other hand, your answer to question 2a is "Yes," proceed to question 2b.

b. What amount of damages, if any, do you find that plaintiff Oliver Medlock, Jr., sustained as a result of the retaliation by the defendant Ortho Biotech, Inc. for his filing and pursuing charges of race discrimination?

Loss of compensation to date $100,000

Future damages

Number of years over which future loss of compensation is reasonably certain to be sustained 2

Total amount of any anticipated future loss $200,000

Mental anguish, humiliation, emotional pain, loss of enjoyment of life, and inconvenience $ 75,000

c. If your answer to question 2a is "No," **DO NOT** answer question 2c, but proceed to question 2d. If your answer to question 2a is "Yes," would defendant Ortho Biotech, Inc. have terminated plaintiff Oliver Medlock, Jr. even in the absence of his filing and pursuing charges of race discrimination?

__ Yes X No

d. If your answer to question 2a is "No," **DO NOT** answer question 2d or 2e, but proceed to question

3. If your answer to question 2a is "Yes," do you find that punitive damages should be awarded against defendant Ortho Biotech, Inc.?

X Yes _ No

e. If your answer to question 2d is "No," **DO NOT** answer question 2e, but proceed to question 3. If your answer to question 2d is "Yes," what amount of punitive damages, if any, do you award against defendant Ortho Biotech, Inc.?

$100,000

3. RETALIATION CLAIM UNDER KANSAS LAW

a. Do you unanimously find by the preponderance of the evidence which is clear and convincing in nature that defendant Ortho Biotech, Inc. terminated plaintiff Oliver Medlock, Jr., in retaliation for his reporting of alleged violations of FDA regulations?

_ Yes X No

b. Do you unanimously find by the preponderance of the evidence which is clear and convincing in nature that defendant Carol Webb terminated plaintiff Oliver Medlock, Jr., in retaliation for his reporting of alleged violations of FDA regulations?

_ Yes X No

NOTE: If your answers to question 3a and 3b are "No," **DO NOT** answer questions 3c, 3d, or 3e, but simply have the foreperson sign the verdict form and your duties are over. If, on the other hand, your answer to questions 3a or 3b is "Yes," proceed to question 3c.

c. What amount of damages, if any, do you find that plaintiff Oliver Medlock, Jr., sustained as

a result of the retaliatory discharge by defendant(s)?

Loss of compensation to date $_____

Future damages

Number of years over which future loss of compensation is reasonably certain to be sustained _____

Total amount of any anticipated future loss $_____

Mental anguish, humiliation, emotional pain, loss of enjoyment of life, and inconvenience $_____

d. If your answer to question 3a is "No," **DO NOT** answer question 3d, but proceed to question 3e. If your answer to question 3a is "Yes," do you unanimously find by clear and convincing evidence that punitive damages should be assessed against Defendant Ortho Biotech, Inc.?

__ Yes __ No

e. If your answer to question 3b is "No," **DO NOT** answer question 3e, but have the foreperson sign the verdict form and your duties are over. If your answer to question 3b is "Yes," do you unanimously find by clear and convincing evidence that punitive damages should be assessed against defendant Carol Webb?

__ Yes __ No

/s/ Lucille Marino
Foreperson

Date: June 28, 1996

PLAINTIFFS EXHIBIT
81
94-2317-JWL

ORTHO BIOTECH

7/7/95

Oliver Medlock
11407 West 77th St.
Lennexa [sic], KS 66214-1459

Dear Oliver:

As a result of issues raised in your deposition, effective immediately, you are suspended from all duties on behalf of the Company. You are not to take any actions on behalf of the Company including, but not limited to, calling on customers or attending the Biregional sales meeting scheduled for next week. This suspension is with full pay and benefits.

We tried communicating this suspension through your attorneys to avoid causing you any unnecessary concern. As of this afternoon, we understand that your attorneys have been unable to contact you. Therefore, I am sending this to you by hand delivery to your home, voicemail and Federal Express.

Please call me to confirm receipt at (906) 704-5253 and I can answer any questions you may have.

Sincerely,

/s/ Marilyn Thompson
Marilyn Thompson
Director, Human Resources
cc: C. Webb

PLAINTIFFS EXHIBIT
84
94-2317-JWL

Carol A. Webb
President

ORTHO BIOTECH

700 U.S. Highway 202
P.O. Box 670
Raritan, New Jersey
08869-0670

(908) 704-5232 Phone
(908) 526-4365 Fax

August 11, 1995

Mr. Oliver Medlock
11407 West 77th Street
Lenexa, KS 66214

Dear Mr. Medlock:

I am writing on behalf of Ortho Biotech Inc. to inform you that your current suspension with pay and benefits, instituted on July 7, 1995, will cease effective August 15, 1995, and on that date, you will be formally discharged from your position as a product specialist with this Company. This decision has been precipitated by behavior and activities constituting unacceptable violations of the rules contained in the Ortho Biotech Personnel practices manual.

During the entire term of your employment, you have communicated your deep dissatisfaction with your compensation to Ortho Biotech management and Ortho Biotech human resources personnel. Human resources, payroll, fleet safety and management employees have

had many conversations and meetings with you, particularly since 1991, discussing your many concerns about your treatment in the Ortho Biotech division of Ortho Pharmaceutical and now at Ortho Biotech Inc. Ortho Biotech has continued to make special efforts to help you succeed and has provided you with assistance is [sic] areas where the Company has identified repeated problems.

Ortho Biotech values its relationships with its employees and customers. Because of the emphasis on employee relations within the Company, the recent revelation that you have been secretly recording conversations with staff, co-workers, supervisors and management for the last six years was quite shocking and seriously undermines working relationships. The sheer volume of these recordings combined with their secretive nature, present many serious problems for Ortho Biotech in maintaining an efficient, collegial work force willing to share information and work cooperatively with their fellow employees. Most people justifiably regard their phone conversations as private interactions between the parties to the conversation, and the secret taping of phone conversations is invasive and disrespectful to the unsuspecting party and constitutes a violations [sic] of Company policy.

As you are aware, you have been warned and counseled, both formally and informally, about your behavior which has included belligerent, and often profane calls, angry demands and physical threats directed to Company management and staff. Your anger and contempt towards Ortho Biotech management has been a recurring problem that has been described with great force and frequency in your recent deposition testimony, as well as in many of your secretly-recorded phone conversations. You have

also indicated in both the deposition and phone tapes that you have had communications with customers and competitors which are also violations of Company policy. You have protected legal rights to pursue a lawsuit against the Company without retaliation, however, this does not mean that continued violations of Company policy or unprofessional conduct can be tolerated.

As of August 16, 1995, you will no longer receive any compensation from the Company. You will receive whatever bonuses you are entitled to as of August 16. Any group accident insurance or long-term disability insurance coverage you have with the Company will also terminate on August 16.

Your group life insurance policy will also terminate on August 16, 1995. You may choose to contact the carrier to convert to an individual policy.

You may continue, decrease or stop contributions to your HealthAccount. CareAccount contributions must stop. You may also elect to continue your Long Term Care Policy, if applicable.

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), you may elect to continue your group medical and dental insurance during the sixty-day period preceding your termination. Unless you choose otherwise, the group medical and dental insurance you elect under Choices will continue until the end of the month after the month in which you take other employment.

You will receive distribution of your account in the Johnson & Johnson Savings Plan within 60 days from the end

of the month in which Corporate Savings Plan Administration receives your request for payment and receives confirmation of your termination of employment. Payment will be made per your direction, whether as a lump sum or in equal annual, quarterly or monthly installments. You may elect to defer distribution to a future date, not later than April 1 of the year following the calendar year, in which you attain the age of 70½. At that time you may receive a lump sum, elect to receive equal annual, quarterly, or monthly installments over a period not in excess of the life expectancy of you and your spouse, if married. Contact the Transaction Processing Center at 1-800-448-4811 for further information and your preference in this matter.

Any vacation pay accrued and through August 15, 1995 will be paid to you shortly after that date. Any personal advances due the Company or the Ethicon Employees Federal Credit Union will be deducted from the cash amounts otherwise due to you hereunder. You should contact the Ethicon Employees Federal Credit Union, 1-908-218-7661, if you have any accounts with them to ensure proper administration of your accounts in the future.

All records and property in your possession or custody belonging to or relating in any way to the affairs of the Company should be gathered and a representative of Ortho Biotech will collect those records and property from you on August 15.

By virtue of the responsibilities reposed in you from time to time, you have had access to and have obtained a

substantial body of confidential information and knowledge about our business, operations and plans which, if disclosed to others, might do the Company and its affiliates irreparable harm. Any further disclosure of that information will result in litigation.

We regret any hardship that this decision inflicts on you and your family, and wish you well in your pursuit of other employment. Although the employment relationship is ending we are willing to discuss providing you with counselling and outplacement services to assist you in your transfer to new employment. Please have your attorney contact our counsel to discuss that if you are interested.

Yours truly,

/s/ Carol Webb /imb

Carol Webb

cc: J.C. O'Shaughnessy, Esq.

Supreme Court, U.S.
FILED
JUL 26 1999
OFFICE OF THE CLERK

No. 98-1829

In The

Supreme Court of the United States

ORTHO BIOTECH, INC.,

Petitioner,

v.

OLIVER MEDLOCK, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The statement of the case submitted by the petitioner, Ortho Biotech, Inc. ("OBI"), omitted the following material facts.

In December of 1993, the respondent, Oliver Medlock, Jr., filed administrative charges with the Equal Employment Opportunity Commission, alleging among other claims that his compensation was the product of racial discrimination. A-4. In June of 1995, Mr. Medlock was deposed in the present case. During his deposition, Mr. Medlock testified about his allegations of race discrimination, including his claim of unequal compensation based upon his race. A-7. About one month later, Mr. Medlock received a letter from OBI's Human Resources Director, Marilyn Thompson. Ms. Thompson's letter informed Mr. Medlock that he was being suspended "[a]s a result of issues raised in your deposition." A-55. At trial, Ms. Thompson admitted that she had investigated Mr. Medlock's administrative charges, and that she was aware Mr. Medlock's allegations in this case included a claim of unequal compensation based on his race.

In August of 1995, Mr. Medlock received a letter from OBI's President, Carol Webb, informing Mr. Medlock that he was being discharged from his employment. A-56 to A-60. Ms. Webb's letter set forth the ostensible reasons for Mr. Medlock's termination, the first of which was that: "During the entire term of your employment, you have communicated your deep dissatisfaction with your compensation to Ortho Biotech management and Ortho Biotech human resources personnel." A-56. At trial, Ms.

Webb admitted that she had read Mr. Medlock's deposition prior to his discharge. Ms. Webb further admitted that she was aware of Mr. Medlock's claim that his compensation was the result of racial discrimination.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's Ruling That Damages For "Loss of Future Compensation" Are Not Subject To The Statutory Cap Under Title VII Does Not Reflect A Significant Conflict Among The Circuit Courts of Appeals.

The first question on which OBI seeks a grant of certiorari is whether the award of damages for "loss of future compensation" is subject to the statutory cap under Title VII. Resolution of this question turns on whether an award of front pay constitutes equitable relief under Title VII.

A. The Tenth Circuit Has Historically Regarded Damages for "Loss of Future Compensation" As Front Pay, Constituting Equitable Relief Under Title VII.

The jury in this case awarded Mr. Medlock "[f]uture damages" sustained as a result of retaliation by OBI for Mr. Medlock's filing and pursuing charges of race discrimination. A-52. The Tenth Circuit construed this award as an award of front pay only, since the award consisted solely of "future loss of compensation." A-20 to A-21, n. 8. Prior to the 1991 amendments to Title VII, the Tenth Circuit had consistently regarded front pay as a type of

"other equitable relief" authorized by § 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]. See, e.g., *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1276 (10th Cir. 1988); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 956-57 (10th Cir. 1980).

Because the Tenth Circuit has historically regarded front pay as a type of "other equitable relief" authorized by Title VII, the circuit court here concluded that the award of front pay fell within the broad exemption from the cap on awards of "compensatory damages" set forth in the 1991 amendments to Title VII. This exemption is contained in 42 U.S.C. § 1981a(b)(2), which states:

> Compensatory damages under this section shall not include back pay, interest on back pay, or *any other type of relief authorized under Section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)].*

Emphasis added.

In its petition for a writ of certiorari (p. 14), OBI contends that the award of front pay here cannot be characterized as "equitable relief," since Mr. Medlock did not seek reinstatement, and since the award of front pay was made by the jury rather than the district court. Both of these arguments must fail. As to the failure to seek reinstatement, the circuit court here correctly noted that Tenth Circuit law allows an equitable award of front pay in lieu of reinstatement, even where the plaintiff does not seek reinstatement in the pleadings. See A-22, n. 9, citing *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980).

As to the award of front pay by the jury, OBI specifically *requested* that the issue of front pay be submitted to the jury. A-41. Mr. Medlock did not object to OBI's request, so the district court submitted the issue to the jury. A-52. If OBI had objected to submitting the issue of front pay to the jury, such an objection would have been meritorious. The Tenth Circuit recently vacated an award of front pay by a jury, holding that "front pay is a form of equitable relief available under 42 U.S.C. § 2000e-5(g), to be awarded by the judge, not the jury." *McCue v. State of Kan., Dept. of Human Resources,* 165 F.3d 784, 791 (10th Cir. 1999). Thus, since OBI here requested that the issue of front pay be decided by the jury and not by the judge, OBI invited the error which it now seeks to use to its advantage. This procedural irregularity makes this case a poor vehicle for reviewing the question of whether front pay constitutes equitable relief under Title VII.

B. A Substantial Majority Of The Circuit Courts Of Appeals Have Historically Regarded Front Pay As Constituting Equitable Relief Under Title VII.

Like the Tenth Circuit, a substantial majority of the circuit courts of appeals have historically regarded front pay as constituting equitable relief under Title VII, prior to the statutory amendments in 1991. Prior to 1991, Title VII only authorized relief in the form of back pay, reinstatement, "or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). This pre-1991 statutory language in § 2000e-5(g) has been interpreted by all of the circuit courts of appeal, with the lone exception of the Seventh Circuit, as authorizing equitable relief

in the form of front pay. See *Kramer v. Logan County School District No. R-1*, 157 F.3d 620, 626 (8th Cir. 1998); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 954 (1st Cir. 1995); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1528 (11th Cir. 1991); *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1561 (10th Cir. 1989); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Pecker v. Heckler*, 801 F.2d 709, 711 (4th Cir. 1986); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890 (3d Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257, 292 (D.C. Cir. 1982); *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Equal Employment Opportunity Comm'n. v. Enterprise Association Steamfitters, Local 638*, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

Because a substantial majority of the circuit courts of appeals have historically regarded front pay as constituting equitable relief under Title VII, the Tenth Circuit's ruling in this case – based on the premise that front pay constitutes "any other type of relief authorized under Section 706(g) [§ 2000e-5(g)]" – does not reflect a significant conflict among the circuit courts sufficient to justify granting OBI's petition.

C. Even The Sixth Circuit Has Historically Regarded Front Pay As Constituting Equitable Relief Under Title VII.

In support of its contention that the circuit court decisions are split over the question of whether front pay constitutes equitable relief under Title VII, OBI cites the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193

(6th Cir. 1997), *cert. denied*, 119 S. Ct. 64 (1998). (Petition at p. 8). In *Hudson*, the Sixth Circuit concluded that an award of front pay is not specifically authorized by Title VII, and therefore such an award is subject to the statutory cap on "compensatory damages." In reaching this conclusion, the Sixth Circuit stated in part:

> [A]s noted above, courts have awarded front pay as an alternative to reinstatement under § 706(g) of Title VII. But, 'front pay' is not specifically 'authorized' by § 706(g) and in the Sixth Circuit, we have treated front pay, in most contexts, as a legal, rather than an equitable, remedy by ruling that, although it is for the court to determine whether front pay is appropriate in lieu of reinstatement, the determination of the amount of any such award is a matter for the jury to decide. *See, e.g. Roush v. KFC Nat. Management Co.*, [10 F.3d 392, 398-400 (6th Cir. 1993)]; *Suggs v. ServiceMaster Educ. Food Management*, [72 F.3d 1228 (6th Cir. 1996)]. *See also, Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884, 893 (6th Cir. 1988).

130 F.3d at 1203-1204.

The above statement in *Hudson* is not an accurate summary of prior decisions by the Sixth Circuit, at least in the context of Title VII. Two of the cases cited in the above quote – *Roush v. KFC Nat. Management Co.* and *Fite v. First Tennessee Production Credit Ass'n* – involved awards of front pay, but the awards were not under Title VII, but rather under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* The third case cited in the above quote – *Suggs v. ServiceMaster Educ. Food Management* – did involve an award of front pay

under Title VII, but the award was in fact made by the court and not by a jury.

As the decision in *Suggs* demonstrates, the Sixth Circuit has consistently treated an award of front pay under Title VII as an equitable remedy, with the amount of the award being determined by the court and not by a jury. See also *Shore v. Federal Exp. Corp.*, 42 F.3d 373, 377-379 (6th Cir. 1994); *Spears v. Board of Educ. Of Pike County, Ky.*, 843 F.2d 882, 886 (6th Cir. 1988); *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985). Cf. *Schwartz v. Gregori*, 45 F.3d 1017, 1023 (6th Cir. 1995) [noting that in the context of Title VII, "this court has characterized front pay as an equitable remedy"].

As the above decisions demonstrate, the Sixth Circuit has historically regarded front pay as an equitable remedy under Title VII. Consequently, the conclusion reached in *Hudson* – based on the premise that front pay constitutes a legal remedy under Title VII – stands alone, and is inconsistent even with decisions within the Sixth Circuit. Because of its questionable legal reasoning, *Hudson* does not create a significant conflict among the circuit courts sufficient to merit plenary review by the Supreme Court.

II. The Instant Case Does Not Present An Appropriate Opportunity For Resolving When A Plaintiff Has Presented Sufficient Evidence To Take Advantage Of The *Price Waterhouse* Mixed-Motive Proof Scheme.

The second question on which OBI seeks review concerns the type of evidence necessary to trigger the mixed-motive proof scheme established in this Court's decision

in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This Court's decision in *Price Waterhouse* admittedly has caused disagreement among the circuit courts of appeals. A majority of the circuit courts has concluded that in order to take advantage of the mixed-motive proof scheme, the plaintiff must present direct or circumstantial evidence that a discriminatory or retaliatory motive was a substantial factor in the particular employment decision at issue. The Tenth Circuit follows the majority view, and in the instant case held:

> To prevail via this direct method, a plaintiff must introduce direct or circumstantial evidence that the alleged retaliatory motive 'actually relate[s] to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace.' *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997). . . .

A-6.

On the other hand, a minority of the circuit courts has taken Justice O'Connor's concurring opinion as establishing the rule of *Price Waterhouse*. In her concurring opinion, Justice O'Connor stated that "[w]hat is required is . . . direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision." 490 U.S. at 277 (O'Connor, J., concurring). The minority of circuit courts has interpreted "direct evidence" to mean non-inferential or non-circumstantial. See, e.g. *Brady v. Fort Bend County*, 145 F.3d 691, 711 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 873 (1999).

The instant case does not present an appropriate opportunity for resolving the conflict between the circuit courts arising from the interpretations of *Price Waterhouse*. The instant case is not an appropriate vehicle for resolving this question because the evidence of retaliation here satisfies even the strict interpretation of "direct evidence."

As discussed above, in her concurring opinion in *Price Waterhouse*, Justice O'Connor stated that in order to trigger the mixed-motive proof scheme, "[w]hat is required is what Ann Hopkins showed here: direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision." 490 U.S. at 277 (O'Connor, J., concurring). However, in *Price Waterhouse*, Ms. Hopkins did not show that the decision makers who denied her a partnership ever actually admitted, or stated expressly that their decision was based on her gender. Rather, what Ms. Hopkins showed was gender-related, stereotyping comments made by some partners, which suggested that gender played a role in their decision. 490 U.S. at 235-237.

The evidence of retaliation which Mr. Medlock presented in the instant case was at least as "direct" as the evidence of discrimination which Ms. Hopkins presented in *Price Waterhouse*. Mr. Medlock presented evidence of two statements by decision makers, which placed substantial negative reliance on Mr. Medlock's opposition to what he believed to be racial discrimination.

Both of these statements were made after Mr. Medlock had testified in his deposition that his unequal compensation was the product of racial discrimination. The

first statement by a decision maker was the letter from Marilyn Thompson, OBI's Human Resources Director, notifying Mr. Medlock that he was being suspended "[a]s a result of issues raised in your deposition." A-7. The second statement by a decision maker was the letter from Carol Webb, OBI's President, notifying Mr. Medlock that he was being discharged because "you have communicated your deep dissatisfaction with your compensation to Ortho Biotech management. . . . " A-7.

The evidence of retaliation which Mr. Medlock presented here was sufficient to trigger the mixed-motive proof scheme, as interpreted by the majority of the circuit courts. In addition, Mr. Medlocks' evidence of retaliation was also sufficient to trigger the mixed-motive proof scheme, as more narrowly interpreted by the minority of the circuit courts. Because Mr. Medlock's evidence was sufficient to trigger the mixed-motive proof scheme under either of the interpretations of *Price Waterhouse*, the instant case does not present an appropriate opportunity for resolving the disagreement.

III. The Question Concerning The Extension Of The After-Acquired Evidence Rule Set Forth In *McKennon v. Nashville Banner Publ'g Co.* Is Not Important Enough To Warrant Review.

OBI requests that this court grant certiorari to determine whether the after-acquired evidence rule set forth in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) should be extended to apply to evidence regarding post-termination misconduct, even when that misconduct may have resulted from a discriminatory or retaliatory

termination. This question is not important enough to warrant plenary review by the Court for two reasons.

First, the Tenth Circuit's opinion in this case is the only circuit court decision addressing the question of whether the after-acquired evidence rule should be extended to post-termination conduct. This demonstrates that the question does not frequently arise, and is not of general importance. In addition, the after-acquired evidence rule adopted in *McKennon* is relatively new, and a consensus among the lower courts may emerge over time.

Second, the Tenth Circuit in this case did not adopt a rigid rule, foreclosing the application of the *McKennon* rule to post-termination conduct in all cases. The Tenth Circuit specifically stated:

> Although we do not foreclose the possibility that in appropriate circumstances the logic of *McKennon* may permit certain limitations on relief based on post-termination conduct, . . . we cannot conclude that the district court abused its discretion in refusing to adopt defendant's proffered instruction.

A-19. Thus, the Tenth Circuit simply held that under the particular facts of this case, the *McKennon* rule was not applicable to Mr. Medlock's post-termination conduct. Such a fact-specific ruling is not important enough to warrant granting certiorari.

CONCLUSION

For the reasons discussed above, OBI's petition for a writ of certiorari should be denied.

Respectfully submitted,

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